VOL. 2. ..... OCTOBER. ..... No. 1.

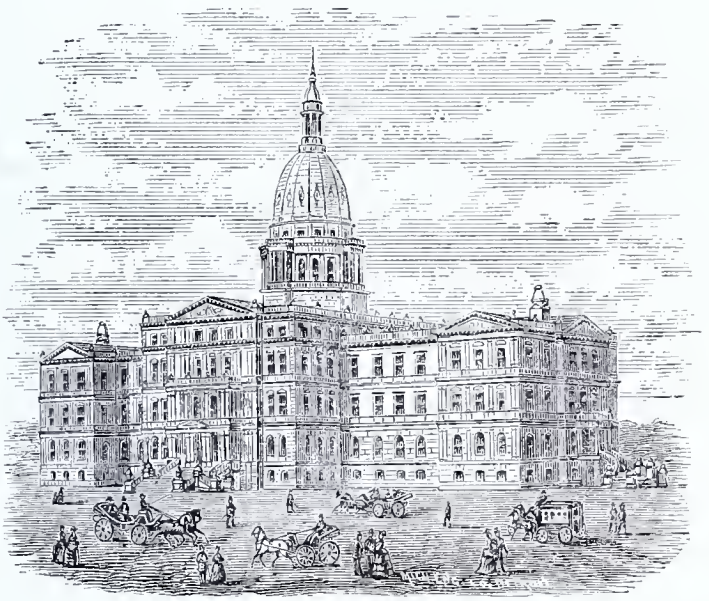
THE

MICHIGAN LAWYER.

A QUARTERLY MAGAZINE,

CONTAINING

ABSTRACTS OF THE DECISIONS OF THE SUPREME COURT OF MICHIGAN.



Capitol at Lansing.

AND REPORTS OF SELECTED CASES DECIDED IN THE CIRCUIT COURTS OF THE STATE, AND IN THE FEDERAL COURTS.

HOYT POST, EDITOR.

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THE MICHIGAN LAWYER.

With this number commences second volume of the MICHIGAN LAWYER. We shall make every effort to have it the equal of the best law magazine in the United States, and earnestly request the co-operation of the lawyers of Michigan to help us to do so. The last volume cost us several hundred dollars more than was received by the subscription, and we were repaid only by the advantage of having it as an advertising medium. To better explain to those that have criticized the arrangement of its pages, we say that they and many others have seen our name sometimes when they were not thinking of us, and in that way we hope we have been repaid in making the expenditure. With this number we shall adopt a different plan, and remove that feature to which some have objected—*i. e.*, having our name, with some kind invitations to think of us when far away, placed boldly on each page—and make each page of text free and separate from all but the subject discussed in that chapter. The pages through the volume will be in consecutive order, and each number will have the index in the back; each index of different courts will be separate, but follow in rotation each after the other.

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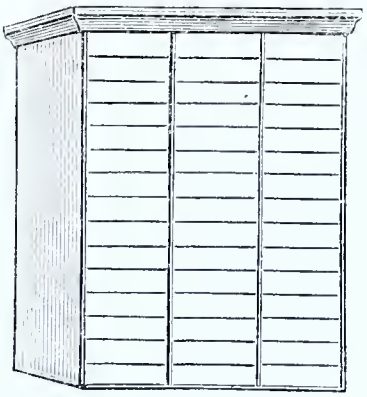

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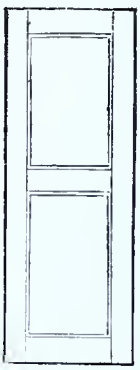

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REPORTS OF SELECTED CASES

DECIDED IN THE

UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF MICHIGAN.

The Orient Mutual Insurance Co. v. The Schooner Dolphin.

1. The contract of marine insurance is maritime in its character and the underwriter may maintain a libel in admiralty for the premium, and has a lien upon the vessel insured, for the payment thereof.

2. This lien, however, ranks in the lowest class of directly maritime liens.

3. The libel should set forth the names of the parties insured, and the character and extent of their interest in the vessel; and should also make it appear that the policy was a marine policy, or, at least, that it covered the vessel during the season of navigation.

4. It seems that this lien may be enforced upon an undivided interest in the vessel, at least if each moiety was covered by a lien of the same amount.

Exceptions to the Libel of the Orient Mutual Insurance Company.

The libelant set forth that it was a New York corporation; that the Dolphin was a vessel of more than twenty tons burden, used in navigating the great lakes and waters connecting the same, and the waters of the State of Michigan; that, on the 6th of March, 1875, the master and owners represented to the libelant that the vessel stood in need of insuranee, and that in pursuance of their representations and request, it furnished insurance in the amount of $4,000; and that there is due to libelant for premiums the sum of $277.38, for which libelant claims a lien upon the vessel as given by the laws of the State of Michigan, and that the whole amount is due. To this libel Stephen B. Grummond, who also filed a libel against the schooner for salvage, excepts; for the reason, that the matters set up therein are not within the admiralty jurisdiction of this court; that a claim for premiums is not a lien

upon the schooner, such as this court ought to enforce by proceedings in rem.

James J. Atkinson, for libelant.
F. H. Canfield, for claimant.

BROWN, J.: The question presented by the exceptions to the libel in this case is one of great novelty and importance; and it is believed that no direct adjudication upon the point can be found either in this country or in England. After years of doubt in the minds of the profession, and some conflict of opinion in the courts, it was finally settled by the Supreme Court, in the case of the *Insurance Company v. Dunham*, 2 Wall., 1, that the contract of marine insurance is maritime in its character, and that in case of loss a libel may be sustained by the insured against the underwriter. It seems to me to follow as a necessary corollary that the underwriter may maintain a suit in admiralty for the premium, as it would be at war with established principles to say that the maritime character of a contract could be invoked by one party and not by the other.

The more serious question, however, remains to be decided, namely, whether the underwriter has a lien upon the vessel for the payment of his premium. The question is not discussed in this case nor in any other case where actions have been sustained in the admiralty upon contracts of insurance. If the analogies of the contract of affreightment are to govern, as indicated by the Supreme Court in the opinion above cited, page 30, the lien would follow as a necessary consequence. It is described in the opinion as "a contract for guaranty, on the part of the insurer, that the ship or goods shall pass safely over the sea, and through its storms and its many casualties, to the port of its destination, and if they do not pass safely, but meet with disaster from any of the misadventures insured against, the insurer will pay the loss sustained." So, in the contract of affreightment, the master guarantees that the goods shall be safely transported (dangers of the sea excepted), from the port of shipment to the port of delivery and there delivered. The contract of the one guarantees against loss from the dangers of the sea, the contract of the other against loss from all other dangers. The object of the two contracts is, in the one case maritime service, and in the other maritime casualties. If in one case the shipper has a lien upon the vessel for a breach of the contract of affreightment, and the ship has a lien upon the cargo for the payment of the freight, it is difficult to see why upon principle the underwriter should not have a lien upon the ship for the payment of his premium.

It is true the general sentiment of the profession is adverse to the existence of such a lien, but no more so, perhaps, than it was to the jurisdiction of the admiralty in actions upon policy of insurance.

In the case of *The Williams*, Brown's Admiralty Reports, page

208, by far the most exhaustive disquisition upon maritime liens to be found in the books, the judge remarked, page 215: "Without any very thorough examination at the time, but drawing mainly upon what we had ever assumed to be the law, we ruled that all maritime contracts, made within the scope of the master's general authority, did *per se* hypothecate the ship; and that those of affreightment, *insurance*, towage, the fitting out and discharge of vessels, and for aiding them in distress, were instances only of the application of the rule." I should have no hesitation in adopting the general principle there announced, that all contracts within the scope of the master's authority are binding upon the vessel, but in his application to the contract of insurance, I think the learned judge overlooked the fact that such contracts are not within the scope of the master's authority.—*General Interest Insurance Company v. Ruggles*, 12 Wheat., 408; *Foster v. United States Insurance Company*, 11 Pick., 85.

Even a ship's husband, whose powers with regard to fitting and equipment of a vessel are much more extensive than the master's, has no authority to bind the other part owners by a contract of insurance. So held in *Bell v. Humphries*, 2 Starkie, 345; *Finney v. The Warren Insurance Company*, 1 Metcalf, 16.

The case of *The Williams* was that of a contract for services in the nature of salvage, made by a master whose power was unquestioned, and it is a direct authority only for the proposition that all contracts which he makes within the scope of his authority are binding upon the vessel. Obviously, however, the learned judge based his opinion upon a much broader principle. On page 217, referring to the case of *The Pigs of Copper*, 1 Story, 314, he observes: "This judgment is referred to in this connection more particularly to illustrate the position that a denial of salvage is not a rejection of a proceeding in rem; but it quite as fully sustains the broader proposition, soon to be considered, that all authorized maritime contracts pledge the vessel for their performance." Again, on page 222, he says: "The wider principle, that every maritime agreement binds the ship as well as the owner, is that upon which we rest our decision."

Although the authorities cited in support of this proposition refer to contracts within the scope of the master's authority, and therefore do not sustain it to its fullest extent, yet I apprehend the principle is a safe one, and subject to two or three exceptions, which at an early day were imported into the maritime laws of this country by the Supreme Court, following too closely the English authorities, one which may be acted upon without trenching upon the proper domain of the common law. So far as a dictum can be an authority, it is certainly an authority for the lien of the underwriters.

The theory that the admiralty courts of this country are restricted to the jurisdiction exercised by the High Court of

Admiralty in England at the time of the adoption of our Constitution is now so completely overthrown that no argument can be properly deduced from it. The only exceptions believed to exist to the jurisdiction in rem of the admiralty over maritime contracts, is that of supplies furnished domestic vessels, established in the case of *The Gen. Smith*, and recently recognized in the case of *Lotawana*, 21 Wall., and that of masters' wages held not to be the subject of a lien in the case of the *Steamboat New Orleans v. Phœbus T. Peters.* Contracts for the construction of vessels which are recognized as maritime by the Continental codes and a lien given thereby, were also held by the Supreme Court in the case of *Roach v. Chapman* not to be subject to the admiralty jurisdiction in any form.

In determining whether a maritime lien exists in favor of the underwriter, it is well to consider the source of the doctrine that courts of admiralty have jurisdiction over policies of insurance. The subject is fully discussed in the case of the *Insurance Company v. Dunham*, pages 31–38, in which the court remarks: "Perhaps the best criterion of the maritime character of the contract is the system of law from which it arises, and by which it is governed, and it is well known that the contract of insurance sprang from the law maritime, and derives all its material, rules and incidents therefrom. These facts go to show, demonstrably, that the contract of marine insurance is an exotic in the common law, and we know the fact historically that its first appearance in any code or system of laws was in the law maritime as promulgated by the various maritime States and cities of Europe." Mention is here made of the maritime laws of the ancient Rhodians, of the ordinances of Barcelona, Venice, Florence and of Antwerp, and the court observes: "But an additional argument is founded on the fact that in all other countries, except in England, even in Scotland, suits and controversies arising upon the contract of maritime insurance are within the jurisdiction of the admiralty of other marine courts. It is also clear that, originally, the English Admiralty had jurisdiction of these as well as of other maritime contracts." * * This last remark is corroborated not so much from positive adjudications to that effect as from the language of the commissions issued to the Vice Admiralty courts which authorize them to take cognizance of marine policies. This would hardly have been done had such jurisdiction never been exercised by the High Court of Admiralty in England.

Tracing, then, the jurisdiction of the Admiralty over contracts of insurance to the continental law, it is pertinent to inquire whether that law gives to the underwriter a lien upon the vessel for the payment of his premiums. Article 16 of the Marine Ordinances of Louis XIV, in enumerating the persons entitled to liens upon ships, makes no mention of underwriters, but Valin, in commenting upon this ordinance, *book 1, lib. 14, sec. 16*, says:

"If this article has not mentioned them (the underwriters), it is probably because the ordinance takes it for granted in many articles under the title of 'insurance,' that the premium is paid in cash at the time the policy is signed, while, by the custom of this place, and of many others, it is paid after the arrival of the ship at a port of safety. However this may be, the insurer of a vessel has doubtless a lien upon her for the payment of his premium as the insurer of a cargo has a lien upon it. This lien ranks with that of the lender upon bottomry and with material men."

Emerigon treats the contract of insurance as analogous to that of maritime loan or bottomry; he observes [Emer. on Maritime Loans, chap. 1, sec. 4]: In the one contract the lender bears the sea risks; in the other, the underwriter. In the one, the maritime interest is the price of the peril, and this term corresponds with the premium which is paid in the other. In either case it is incumbent upon the plaintiff to prove that the condition has been fulfilled. In case of a suit it lies upon the lender, in order to render the contract of maritime loan executory to show that the ship has arrived at her port of destination in safety; and in an action on a policy of insurance it lies upon the assured to prove the loss, capture or shipwreck of the vessel.

The policies of insurance made on loose sheets of paper create a lien on the property of the parties, provided they are executed before sworn brokers or notaries; but the other contracts do not create such a lien unless they are recorded by a notary in his public register, in the sworn form as ordinary contracts.

If any doubt, however, ever existed in the law of France, with regard to this lien, it is put to rest by article 191 of the commercial code, which reads as follows: Privileged debt are the following, and in the order in which they are classed:

1. Judicial costs and other charges incurred in obtaining a sale of the vessel and a distribution of the price.

2. The charge for pilotage, tonnage, hold fees, mooring and dockage.

3. The wages of the keeper and the expenses of guarding the vessel from the time of her entrance to the port to the sale.

4. The storage of her rigging, tackle and apparel.

5. The expenses of repairing the vessel, rigging and apparel since her entrance into port from her last voyage.

6. Wages and pay of the captain and crew employed in the last voyage.

7. The sums loaned to the captain for the necessary expenses of the vessel during the last voyage, and the reimbursements of the price of goods sold by him for the same purpose.

8. The sums due to the vendor, material men and workmen employed in her construction if she has not yet made a voyage, and those due to creditors for furnishing work, labor and for refitting, victualing, outfits and equipments before the departure of the vessel if she has already made a voyage.

9. The sums loaned on bottomry on the rigging and apparel for repairs, victualing, outfit, equipment before the departure of the vessel.

10. The amounts of the premiums of insurance effected on the hull, rigging, apparel, outfit and equipment of the vessel for her last voyage.

11. The indemnity due to the freighters for not delivering goods laden on board or for the losses which the goods may have sustained from the default of the captain or crew.

The creditors comprised in each of the numbers of the present article shall have a concurrent lien on the vessel for the amount of their demand, and in case of insufficiency the price of the vessel shall be divided equally among them (i. e., those of the same class) in proportion to the amount due each.

In a recent work upon the commercial code of France by Edmund Dufour (Paris, 1859), in speaking of this article, section 215, the author observes: "We see that if the code has admitted this opinion (of Valin) as to the principle of the lien, it has largely modified the combinations. The underwriters are still paid before the shippers, and that is all. They are ranked by the material men, who are placed two degrees above them in the scale of liens. They are also distanced by lenders upon bottomry, who immediately precede them. This classification appears to me more rational than that of Valin. For, the truth is, insurance is only a private affair of the insured; it is a very proper act of prudence; it certainly merits and it possesses all the sympathies of the law; but it is, after all, only a passive element of navigation. It rather repairs disasters than comes directly in aid of them of its efforts. It is otherwise with the material men, as well as with lenders upon bottomry. It is the labor of the one, and the goods or the money of the other which permits the vessel to undertake its voyage. There is then in their favor a reason for preference, which is not wholly arbitrary, and the code has done well in recognizing it." The nature of this lien is discussed at length, and is applied as well to time policies as to policies for a single voyage.

In a recent admirable dictionary of the maritime law of France by Aldrick Caumont, Paris, 1867, under the head of marine insurance, section 141, the author observes: "A lien is attached to the premium for the last voyage if it be that made during the life of the policy upon the hull. This lien for the last voyage, resulting from articles 191 and 192, exists whenever there is a policy executed. The insured, who asserting his right to suit, has attached the proceeds of the ship for the amount of his premium, is not permitted to claim a lien for the increase of premium for the time during which navigation is closed.

"Any number of voyages made during the time fixed for the duration of the insurance are considered as one and the same voyage. The broker has a lien upon the sum assured for, the

premium which he has paid. The liens for premiums of insurance upon property rank only after that accorded to contracts of bottomry. They constitute an expense made for the preservation of the res. In case where an insurance upon the hull has been made for a limited time, the underwriters have a lien upon the ship, not only for the premiums of the last voyage, but also for the entire premium due under the policy." In support of these various constructions of article 191 the author cites opinions of the Court of Cassation, of the Imperial Court of Bordeaux, and Rouen, and Aix, and of the Tribunal of Commerce of Marseilles.

Now, if the Supreme Court has adopted the Continental law in respect to jurisdiction over contracts of insurance, must it not be presumed logically to have adopted it as an entirety and not by piecemeal? It certainly seems so to me, and it goes very far to justify the language used by the circuit judge in the case of *The Williams*.

It is claimed, however, that these contracts are made exclusively upon the credit of the owner. If this was so, it might be presumed in a particular case that the lien was thereby waived, but with the exception of supplies, repairs and materials furnished in the home port, the mere fact that the contract is made by the owner does not import a waiver of lien. There is no doubt of the existence of such lien in favor of seamen, although hired by the owner in person; nor in favor of shippers, where the contract of affreightment is made with the owner. Nor is it, I believe, any objection to the lien of a lender upon bottomry, that the bond was made by the owner.

Under the ruling in the case of The Insurance Company against Dunham, I feel constrained to hold that the contract of insurance being maritime in its character, the underwriter is entitled to a lien upon the ship for the payment of his premiums; although for the reason given by Dufour, I think it should rank in the lowest class of directly maritime liens.

I think, however, the libel is defective in this case, in failing to aver the names of the parties insured, and the character and extent of their interests in the vessel. I think it should also appear that the policy was a marine policy, or at least that it covered the vessel during the season of navigation. I regard it as very doubtful, whether an ordinary fire policy covering a vessel, while lying at the wharf during the winter, would be the subject of admiralty jurisdiction. The above quotation from Caumout citing a judgment of the Tribunal of Commerce at Marseilles, apparently supports this opinion. The schedule annexed to the libel seems to indicate that the policies were issued, covering separate moieties of the vessel. This, however, should be made distinctly to appear. I think I see considerable difficulty in enforcing the lien of an underwriter upon an undivided interest of a part owner, especially if the proceeding were an original one, against the vessel itself, and not against its proceeds of sale. The same

difficulty, however, frequently occurs in connection with the mortgages upon undivided interests, and I should not regard it as insuperable if it should appear that eaeh moiety of the vessel was covered by a lien of the same amount. The question could be easily solved, as the effect would be practically the same as if the entire vessel was covered by a single policy. The difficulty with the libel in this case is, that it has been attempted to employ the ordinary blank libels for supplies in actions for premiums, for whieh they are illy adapted.

Upon this ground the exceptions to the libel must be sustained with leave to amend.

In Re George Chandler—In Bankruptcy.

The reasonable expenses of petitioning creditors in launching proceedings in bankruptcy, including counsel fees, are properly allowable against the estate even since the revision of the general orders of October, 1874.

Petition for Review of Proceedings in the District Court.

Don M. Dickinson, for petitioning creditors.
F. G. Russell, assignee, *contra.*

Hitchcock, Newell & Co. and others, who filed the petition by which Chandler was adjudged bankrupt, filed a petition in the District Court asking that they be allowed their expenses, including counsel fees, in and about launching the proceedings. The district judge recognized the propriety of the rule, whieh had been uniform, allowing such expenses prior to the revision of general orders in October, 1874; yet eonstrued order thirty as changing the rule and cutting off all allowances for counsel or attorney fees to petitioning creditors, save such as are allowed by general order thirty-one (a docket fee on trial of $20).

The clause of the order so construed is as follows:

"No allowance shall be made against the estate of a bankrupt for fees of attorneys, solicitors or counsel, except when necessarily employed by the assignee, when the same may be allowed as a disbursement."

Judge Emmons reversed the judgment of the District Court, and gives full force to the principle reeognized and applied in the District Courts prior to the revision of October, 1874.

He held that the clause of order thirty in question should be construed as applying only after the appointment of an assignee. Instances were cited on the argument where petitioning ereditors' expenses, laid out in launching the proceedings and proteeting the fund prior to adjudication, had amounted to more than the debt and far more than the dividend payable from the estate on the debt.

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The Florence—In Admiralty.

1. Where the master of a scow took possession of a lighter without authority, used her in getting wood off from the shore of Lake St. Clair to the scow, and neglected to return her:—*Held*, that a Court of Admiralty had jurisdiction, and that the scow was liable in rem for the conversion.

2. Inasmuch as the lighter was employed in the service of the scow upon navigable waters, she was held liable, notwithstanding she was originally seized in a fish pound staked off from the Detroit river.

The libel purports to be in a case of *tort*, and sets forth that libelant, being the owner of a lighter, the master of the scow Florence seized upon her, carried her away and appropriated her to the use of the scow, and has since kept and retained the same, refusing to return her on request, to libelant's damage $60. He also claims the rental value of the lighter from April 15, 1875, the date of her seizure, until the filing of the libel. Exceptions are taken upon the ground that the facts stated do not constitute a lien upon the vessel by the maritime law, and that libelant has not made a cause of action in rem. The answer also denies the principal allegations of the libel, and claims that the lighter has been detained by a ship carpenter, who made certain repairs upon her by order of the libelant, and denies detention by the respondent. The facts are, in substance, that the lighter being sunk in a fish pound on the Canadian side of the Detroit river, communicating with the river by a narrow opening, the claimant applied to a brother of the libelant for the lighter to be used in carrying wood off the shore to the scow, the Florence being at that time engaged in the wood trade between Pike creek, in Lake St. Clair, and Detroit. Wallace Lemaire, brother of the libelant, without any authority, it seems, gave the claimant permission to take the lighter, which he did. Having used her for two or three days and finding her of little value, he left her lying near the shore of the lake, where she pounded and became leaky. Libelant having made demand for the return of the scow, it was agreed that she should be left at a ship carpenter's in Canada to be repaired. The

repairs being finished, the carpenter refused to deliver her to the libelant, who filed this libel to recover her value.

George W. Moore, for libelant.
H. H. Swan, for respondent.

BROWN, J.: The principal question discussed upon the argument related to the jurisdiction of the court. The libel sounds in *tort*, and it was strenuously insisted by claimant's advocate that no lien attached to the scow for the conversion of the lighter, both parties conceding that claimant took possession of her without authority from the owner. Cases of spoliation and damage are of admiralty and maritime jurisdiction. These include illegal seizures or depredations of vessels or goods afloat. Every violent dispossession of property on the ocean is, *prima facie*, a maritime tort, and as such belongs to the admiralty jurisdiction (Benedict, sections 310, 311); and the owners of a vessel are liable for torts committed by the master employed by them, under a general principle of maritime law, and not by virtue of any special contract.

There can be no doubt that if this were a case of contract, that is, if the agent of whom the claimant hired the scow, and whom claimant in good faith believed to have authority to loan it, had in fact possessed that authority, a libel in rem could have been sustained for the use of the lighter. A person furnishing a small boat or a lighter for the use of a vessel has as valid a lien upon her as though he had furnished an anchor, a compass, a chronometer or any other of the articles usually denominated materials. In the case of *The Dick Keyes*, 1 Bissell, 408, Mr. Justice McLean held that where the master of a steamboat on her behalf agreed to pay $20 per day for the use of a barge, a libel might be maintained against the steamboat for the amount. Mr. Parsons says, 2 *Pars. on Shipping*, 148: "If a barge is necessary to a steamboat, its hire to it will be regarded as material furnished for its equipment," citing *Ameis v. Steamboat Louisa*, 9 Mo., 621; *Gleim v. Steamboat Belmont*, 11 Mo., 112; *Steamboat Kentucky v. Brooks*, 1 Greene, Iowa, 298; cases which fully sustain the text of the learned commentator.

Now, upon principle it is difficult to say why, if an action *in rem* will lie for the use or value of property lawfully obtained, a similar action will not lie for the use or value of property unlawfully obtained. In other words, where the wrong is greater, the remedy should not be less. The general rule with regard to torts seems to be, that the owners and the vessel are liable for all the acts of the master done in the execution of the business in which he may be employed by which third persons are injured, whether the injury was occasioned by the unlawful acts or by the negligence or want of skill of the master.—*Dias v. The Revenge*, 3

Wash., 262; *Dean v. Angus,* Bees Admiralty, 369; *The Martha Ann,* Alcott, 18.

The principle underlying these decisions is, that for torts committed in the business of the master, as such, or in which the ship is the active, the injuring or the benefited party, the injured party has his remedy as well against the vessel as against her owner and master. The mere fact that the person committing a tort is master of a vessel of course does not make her liable, but if it is an act done in the pursuance of his business as master, or is beneficial to the vessel, she becomes liable in rem. The English cases hold that the vessel is not liable for a willful collision. This doctrine, however, is denied in the case of *Ralston v. The State Rights,* Crabbe, 227, where a libel was sustained for running down the libelant's vessel, done by the express direction of the master of the colliding vessel.

But it is insisted in this case that locality being the test of jurisdiction in cases of tort, the injury was not done upon navigable waters, but that the lighter was seized within a fish pound staked off from the river. I do not regard this fact as material. In the case of *Plummer v. Webb,* 4 Mason, 380, a libel was sustained for the abduction of a minor son upon a voyage upon the high seas. Mr. Justice Story observed, "Here it is true that the tortious act, or cause of damage, might be properly deemed to arise in port, but it was a continuing act and cause of damage during the whole voyage; it was in no just sense a complete and perfected wrong, until the departure of the vessel from port, and it traveled along with the parties as a continuing injury through the whole voyage and terminated only with the death of the son at sea. See also *Charles Wood v. Hall,* 3 Sumner, 128.

In the case of *The Bark Yankee v. Gallagher,* McAllister, 467, the court held that "if the tortious act originates in port and is not a perfect wrong until the vessel leaves the port, it is a continuous act and travels with the tort feasor and the injured party during the whole voyage, and comes within the jurisdiction of the admiralty upon the principle that if the thing be done on the high seas and brought to land, it is appropriate to a court of admiralty to decide the question as a marine tort." In this case the libelant had been seized in the city of San Francisco by a vigilance committee and carried on board the bark and landed in the Sandwich Islands.

In the case at bar, admitting that the fish pound was not a navigable water, the lighter was taken to the scow then lying in navigable waters and was used by her there, and I think the case falls within the authorities above cited.

No willful misconduct or wrongful purpose on the part of the claimant need be shown, for the gist of the action is the use of the lighter by the vessel, and I hold that it makes no difference

whether the claimant beeame possessed of her by a contraet or by an aet whieh was teehnieally a eonversion.

The exeeption to the jurisdietion must therefore be overruled.

Ouillette, the owner of the seow, took possession of the lighter without authority from the libelant. After he had had her for some time, and she had been injured either by Ouillette's negligenee in allowing her to pound upon the bottom, or by beeoming leaky, libelant went to Ouillette and demanded that the lighter should be returned to him in good order. Ouillette then put her into the hands of a carpenter, who repaired the damages done her and also made some alterations and repairs on her at the request of the libelant. When libelant went to the earpenter to demand her, he refused to give her up, either until the repairs put upon her by Ouillette's direetions were paid, as libelant says, or until libelant would release Ouillette from all liability, or would elear Ouillette of the law, as the earpenter says. As it is elear that libelant offered to pay for the repairs that he had ordered, and the earpenter did not retain her upon that ground, his further detention of her must be attributed to Ouillette, notwithstanding his statement that the earpenter detained her without authority from him. It was the duty of Ouillette to see that the lighter was returned, and no excuse for the non-performanee of that duty not attributable to the libelant, ean be aeeepted.

There is considerable eonfliet with regard to the value of the lighter, but upon all the testimony I think that $45 is as much as she is worth. There must be a deeree for the libelant for this amount, with interest.

George H. Parker et al. v. John McLennan—In Admiralty.

1. Where a tug libeled for negligence has been purchased by the claimants after the cause of action had accrued:—*Held*, the original owners of the tug might file a cross-libel under Rule 53, and that proceedings under the original libel should be stayed until respondent in the cross-libel gave security to answer the demand.

2. But a cross-libelant should act with reasonable promptness, and a motion for security made upon the eve of trial, after witnesses had been summoned and the case was ready to proceed, should not be granted.

On Motion for Security by Respondent in the amount claimed in the Cross-libel.

On June 5, 1875, the respondent, McLennan, filed his libel against the steam tug George H. Parker, claiming damages for the negligence of the tug in towing a eertain raft of timber from Tawas, Miehigan, to Tonawanda in the State of New York. On August 4th, Albert W. Schulenburg filed his elaim and answer to said

libel, setting forth that he was the sole owner of the tug, having purchased her in February preceding, about eight months after the cause of action arose, from George H. Parker and others, cross-libelants in this case. His answer further sets forth that he had no knowledge of the facts set forth in the libel or of the libelants' claim, until the suit was commenced; that by the terms of his bill of sale the former owners were liable for all claims against the tug; and prayed that these owners might be permitted and required to come in and answer for the tug.

On December 16th the cross-libel was filed by the former owners of the tug against the libelant in the original suit, setting forth that the tug was guilty of no negligence, and claiming the contract price for the towage service.

W. A. Moore, for the motion.
George W. Moore, for the original libelant.

BROWN, J.: The cross-libel in this case was filed at the last term of this court, and upon the eve of the trial of the original case motion was made that the respondent in the cross-libel give the security now asked for, but it was denied upon the ground that the party had no right to come in, as the case was called for trial, and ask for a stay of proceedings until a bond was filed to answer the claim set up in the cross-libel.

I then held the cross-libelant should prosecute his claim with reasonable diligence, and had no right to put a stop to the case after witnesses had been summoned and the libelant had appeared and was ready to commence the trial of his original case.

The case was, however, for some other reason, continued for the term, and the motion is now renewed under somewhat different circumstances. Rule 53 provides that "whenever a cross-libel is filed upon any counter-claim arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security in the usual amount and form to respond in damages, as claimed in said cross-libel."

Although this may not be strictly a cross-libel, inasmuch as the parties plaintiff are not parties of record in the original suit, and were not the owners of the tug at the time the libel was filed, yet as they are the parties guilty of the negligence charged in the original libel, if negligence there be, and as they are the parties who must ultimately pay this claim, if the original libel be sustained, I regard this proceeding as a cross-libel within the spirit and scope of the rule. It is certainly a counter-claim arising out of the same cause of action for which the original libel was filed, and the reasons which dictated the adoption of this rule apply as forcibly to this case as if the cross-libelants were now owners of the tug. I do not think these cross-libelants have been guilty of such laches as should disentitle them to make this motion. The original libelants were not ready for trial at the time the case was

called, though it was supposed they were at the time the motion was made, and the facts were such that a continuance for the term was granted. I see no harm that can now result to the original libelants from this motion, and it is therefore granted.

The James D. Parker — In Admiralty.

1. An information in rem. for a violation of Section 4 of the Act of February 28th, 1871, forbidding the carrying of petroleum upon passenger steamers, cannot be sustained.

2. The carrying of petroleum on passenger steamers in April, 1874, cannot be punished under the Revised Statutes, which were not enacted as a law of Congress until June, 1874.

Information for the Unlawful Transportation of Petroleum.

The information, after alleging the seizure of the steamer, for a forfeiture incurred under Section 4 of the Act of February 28, 1871, alleged, in substance, that, in April, 1874, the steamer being duly licensed and enrolled and engaged in the navigation of the Ohio and Mississippi rivers, carrying passengers and freight, carried twenty barrels of petroleum from Evansville, Ind., to Memphis, Tenn., there being at that time other practical modes of transportation of the same, namely: by railroads connecting the two places.

The answer admitted the employment of the vessel and the transportation of the petroleum in question, but denied that it was in violation of any law, and that there was any other practical mode of transporting it.

W. W. Murray, District Attorney, for the U. S.
Mr. Warriner, for claimants.

Brown, J.: Upon the argument, it was insisted that the government had no right to institute a proceeding in rem for the recovery of the penalty provided for the violation of Sec. 4 of the Act of February 28th, 1871. No exception was taken to the information upon that ground, but as the objection involved the jurisdiction of the court, and as the district attorney did not insist upon the failure of the claimant to put the objection upon record, I think it may, with propriety, be considered in this opinion. The clause upon which the information is based provides that "refined petroleum which will not ignite at a temperature of less than 110 degrees of Fahrenheit thermometer may be carried on board such steamers upon routes where there is no other practical mode of transporting it, and under such regulations as shall be prescribed by the board of supervising inspectors, with the approval of the secretary of the treasury." An earlier clause of the section forbids the carrying of crude or refined petroleum, or any other like

explosive burning fluids, as freight, or used as stores, on any steamer carrying passengers. Section 4 itself contains no penal clause, but it is insisted by the district attorney that, under section 1, the owner was subject to a forfeiture of five hundred dollars, for which amount the steamboat was liable. This section provides that "no license, register or enrollment shall be granted, or other papers issued, by any collector or other chief officer of the customs, to any vessel propelled in whole or in part by steam until he shall have satisfactory evidence that all the provisions of this act have been fully complied with; and if any such vessel shall be navigated without complying with the terms of this act, the owner or owners thereof shall forfeit and pay," etc., "for which sum the steamboat or vessel so engaged shall be liable and may be seized," etc.

Section 68 provides that the penalty for the violation of any provision of this act that is not otherwise provided for shall be a fine of five hundred dollars. The act is entitled "An Act to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes," and its main object is to require that steamboats carrying passengers shall be provided with the proper equipments for the preservation of life and property, in case of disaster. The obvious import of the first section is, that no enrollment shall be granted by the collector to any steamboat until he shall have satisfactory evidence that such vessel is provided with the proper pipes, fire pumps, hose, lifeboats, buckets, axes, etc., required by the terms of the act, and if any such vessel shall be navigated without complying with these terms the forfeiture shall be incurred, for which a proceeding in rem may be taken.

The provision in question has received judicial construction in but one case, viz.: *The United States v. The C. B. Church*, 1 Woods, 275, in which the same construction was given to this section, and it was held that the penalty for a violation of the fourth section could not be recovered by a proceeding in rem, an action of debt against the offending parties being the proper remedy. I fully concur in this opinion, and deem an extended argument unnecessary, as it would be a mere repetition of the opinion of the learned judge in that case.

Section 1 evidently points to affirmative acts, "compliances" with the law, something to be done by the owner, and not a prohibition of the carrying of dangerous articles. It is the failure to provide and keep on board the appliances which are made by law conditional and preliminary to the issuing of the enrollment and license, which this section is designed to reach. It provides a penalty for the omission of a statutory duty, not for the commission of a positive offense. Section 68 establishes the penalty for a violation of the provision in question, and the personal action is the only remedy.

But it is further claimed by the government, that the recital of

the date of the act is immaterial, and that the action may be sustained under section 4472 of the Revised Statutes, a substantial reënaetment of section 4 of the Act of 1871, and seetion 4499, which provides that "if any steam vessel be navigated without complying with the terms of the title, the owner shall be liable in a penalty of five hundred dollars, for which the vessel may be seized. This and the preceding section are substantial reënaetments of the first section of the earlier act. The transportation, however, is alleged to have occurred in April, 1874, while the Revised Statutes were not enacted until June 22d, 1874. It is true that section 5596 repeals all acts passed prior to December 1st, 1873, any portion of which is embraced in the revision, and that section 5601 provides that the enactment of the revision is not to affeet the repeal of any act passed after December 1st, 1873; but as the Revised Statutes themselves were not enacted until June, no proceeding under them prior to that date can be sustained without giving the revision a retroaetive effeet. Seetion 5598 provides that all offenses committed and all penalties incurred prior to the repeal may be proseeuted and punished in the same manner and with the same effect as if the repeal had not been made; and as the Revised Statutes did not take effect as a repealing act until June 22, 1874, the law of 1871 was still in force when this offense was committed.

As before observed, under that statute this action cannot be sustained.

An order will be entered dismissing the information.

The Poland—In Admiralty.

1. When, after the filing of a libel against a vessel and giving the stipulation to answer judgment, the claimant and owner of the vessel dies and the answer is put in by the administrator of his estate, the same rule with regard to the exclusion of parties in interest as witnesses (§858 U. S. R. S.) applies, as if the case were an ordinary common-law action brought against the administrator.

2. In such a case, the surviving party is not entitled, as a matter of right, to testify as to transactions with the intestate; but when the court can see that justice demands that he should be sworn, it is within its discretion to permit his testimony to be given.

On Petition of Libelants to permit themselves to be Sworn as Witnesses in their own behalf.

This was a libel for services rendered in towing the barge Poland from Port Huron to East Saginaw. After the filing of the libel, and giving the stipulation to answer judgment, the claimant and owner of the vessel died, and the answer was put in by the administrator of his estate. Upon the hearing, libelants

offered themselves as witnesses to certain transactions between them and the deceased. It was claimed, however, in defense, and the court so held, that the case fell within the proviso of section 858 of the Revised Statutes, and that they could not testify as to any transactions with or statements by the deceased claimant. The trial was then stopped and the case ordered reheard at the next term of court. Libelants then petitioned the court for leave to testify at the rehearing, claiming that the matter was within the discretion of the court. The remaining facts are stated in the opinion.

George E. Halladay, for libelants.
F. H. Canfield, for claimants.

BROWN, J.: It was insisted at the hearing that, as the action was not originally brought against the administrator, but was a proceeding in rem, the case did not fall within the proviso of section 858, and that the libelants were entitled to be sworn as to transactions with the intestate as a matter of right. I am satisfied, however, with the ruling made at the hearing upon this point. It was held in the case of the *United States v. Ten Thousand Cigars*, 1 Woolworth, that a proceeding in rem to obtain a forfeiture of property for violation of the internal revenue law was a *civil* action, within the meaning of the section above quoted. Libelants would undoubtedly have been entitled to be sworn, had it not been for the proviso, although the action was not originally commenced against the administrator of the owner; still, it has been held that, after the giving of a stipulation to answer judgment in a suit in rem, the action becomes a personal one, as between the libelants and the claimant, and I think the same rule with regard to the exclusion of parties in interest as witnesses applies, as if the case were an ordinary common-law action brought against the administrator.

The proviso, however, itself makes an exception in favor of parties "called to testify to transactions with the deceased by the opposite party, or required to testify thereto by the court." Libelants now petition for leave to be sworn under the last clause of this proviso. It is claimed by the defense, however, that this clause applies only to those cases where the opposite party is entitled to call his antagonist and cross-examine him as upon a bill of discovery; that is, although the party cannot make himself his own witness, he may be made a witness by the opposite party, though not for himself, as if he were a witness in his own behalf. Then analogies of chancery practice are suggested where it is understood a similar practice prevails.—*Benson v. Leroy*, 1 Paige, 122; 3 *Dan. Chan. Prac.*, 884–5, Notes.

Perhaps the use of the word "required," instead of permitted, gives some support to this theory, but I think this could not have been the intention of the legislature, as no such clause would have

been necessary to produce this effect. The practice in admiralty is analogous to that in chancery, and whatever the rules of chancery practice would permit, would also be permitted in admiralty without legislation. Both systems of practice are derived from the civil law, and the methods of procedure, after the institution of the suit, are similar, except where the peculiar exigencies of the admiralty suggest a different course. I think it was the intention of the legislature, by the clause in question, to permit the court, in cases falling within the proviso, to exercise its discretion in receiving the testimony of the party as a witness. Where the case turns upon a transaction between one party and another deceased, and the circumstances are such as to induce the court to believe that the transaction would be denied by the deceased party, if he were alive, and there are no extraneous circumstances throwing light upon the subject, then the testimony of the surviving party should be excluded; but where the court can see that the transaction, as stated by the surviving party, is probable, and there are corroborating circumstances tending strongly to support his version—in short, when it can see that justice demands that the surviving party should be sworn—the discretion of the court should be exercised to permit his testimony to be given.

Apply this view of the law to the present case. While the barge was lying at Port Huron, a contract was made between the masters of the tug and barge, by which she was to be towed with other barges to Bay City for one hundred dollars. Shortly before reaching Pointe Aux Barques, the tow was overtaken by a heavy storm, the line connecting the Poland with the barge next in front of her gave way and she was left adrift. After the tow was broken up, the tug went back to Port Huron, and in a day or two thereafter went in search of the barges, found the Poland at anchor about twenty-five miles from Port Huron, towed her back to Port Huron, and the next day took her and another barge and started again for Bay City. On reaching Saginaw Bay, another storm arose, the Poland's line again parted and left her adrift. The tug then went into Bay City for more coal, and came out the next day to look after the barges. Just outside of Bay City Mr. Clark, the original claimant and owner of the Poland, got on to the propeller from the tug, went up to Port Hope, where they learned that the barge Poland had gotten back to Port Huron, and the conversation sought to be given in evidence was then had. It is claimed by the libelant Graves, with whom the conversation was had, that the wind being then ahead, he told the owner of the Poland that he would rather give him what he had done than go down after her to Port Huron, but Clark said he felt as if he ought to pay his tow bill; that he told the owner it would not pay him to go to Port Huron and tow her up there for such a bill. The owner replied, he felt as if he ought to pay his tow bill, "after I had done what I had to get her there," and if he would

go to Port Huron after his barge, and tow her to Bay City, and not tow anything else, he would give him another hundred dollars, which would make the bill two hundred instead of one hundred dollars. Another witness, not a party to the suit, testified that there was a conversation between these parties, and that the owner of the Poland told him "there was an extra;" "they were to pay extra, but he did not understand what amount." As matter of fact, the tug did go to Port Huron, took the barge in tow and towed her to Bay City alone, and delivered her there in safety. He also testifies that there was considerable reluctance on the part of the owner of the tug in undertaking to tow the Poland again. After the barge arrived at Bay City, a bill for two hundred dollars was made out; and it is also claimed by another party, libelant, that $102.50 was paid upon this bill, and that there now remains a balance of $97.50 due him. Libelants now request to be sworn as to conversation with the owner of the barge at Port Hope, and to the payment of $102.50. In determining this question, I consider myself at liberty to look, not only at the petition itself, but at all the testimony which was given at a former hearing, including the testimony of the parties themselves, which was ultimately ruled out. It is manifest that the service performed by the tug was a very arduous and meritorious one. In endeavoring to carry out his first contract, the tow was overtaken by two storms, the Poland's line parted twice, without any fault of the tug, and she was left adrift upon the lake. To have ventured, with other barges, to turn around and attempt to pick up a barge under such circumstances, would have been extremely hazardous, not only for the tug, but for the other barges, and I think that no prudent tug-master would have ventured to do this in his encumbered condition. In the case of *The Clematis*, it was held by this court that the duty of turning back and endeavoring to pick up a tow of barges under those circumstances, was a matter which rested to a great extent in the judgment and discretion of the master, and that a court would not interfere with or reverse that judgment if fairly exercised, although the burden of proof was upon the tug to show that his action was justified by the exigencies of the case. I question seriously whether the intervening circumstances were not such as to justify the master of the tug in treating his original contract as abandoned, and whether, if he had then succeeded in picking up the barge after the line was broken, he would not have been entitled to compensation in the nature of salvage. This view is supported by several recent English cases. —*The J. C. Potter*, 3 Maritime Law Cases, 506; *The Minnehaha*, 1 Lushington, 348; *The Pericles*, Browning and Lushington, 181; *The Galatea*, Swabey, 350; *The White Star*, L. R., 1 Admiralty, 170; *The Waverley*, 1 Aspinall Maritime Law Cases, 47.

The proposed testimony tends to show that the original contract was abandoned by mutual consent; that a new contract was made,

by which the tug agreed to go to Port Huron and tow the barge alone to Bay City for $200.

The circumstances seem to me to indicate as quite probable that such contract was made. Libelants produce a bill for $200, upon which there is an endorsement, in writing, of a payment of $102.50. The claimant admits the payment of $100, but objects to the proof of the payment of a larger amount, on the ground that it was a transaction with the deceased. It seems to me highly improbable that the payment of a greater amount than the contract called for upon the theory of the claimant, would have been made if the original contract had been considered still in force. It also seems to me improbable that libelants would admit a larger payment to have been made than was in fact made, and the endorsement upon the draft, though unexplained, seems to support his theory. It is also claimed by libelants that the owner of the barge admitted to them more than once the correctness of the account as rendered.

Under all the circumstances of the case, I am satisfied that justice requires that the libelants should be permitted to testify in their own behalf as to transactions with the deceased, and an order will be entered to that effect.

In Re Henry H. Stafford.—In Bankruptcy.

Registers may take cognizance of uncontested petitions filed by attorneys against the assignee to compel the payment of their fees and disbursements.

On Exceptions to the Decision of the Register refusing to act on the Petition of William H. Parks for an Order Requiring the Assignee to pay him seventy-five dollars for his services in making the Schedules filed by the Bankrupt.

Similar exceptions were filed to the decision of the same register declining to act on a petition of the same parties in the case of the Michigan Iron Company for an order allowing a claim for professional services, disbursements, expenses and fees incurred in obtaining an order restraining certain sales of the bankrupt's property on execution. The register declined to act upon these petitions on the ground that they should have been brought before the court, and that he had no authority to act unless under a special order of reference.

Brown, J.: By sec. 4 of the bankrupt act, in which the powers of the registers in bankruptcy are defined, after the enumeration of certain specified matters, a general power is given them to "sit in chambers and despatch there such part of the administrative business of the court, and

such uncontested matters as shall be defined in general rules and orders to be made by the Supreme Court." This power given to the Supreme Court it had not exercised in its general rules and orders adopted prior to April, 1875; but the power of the register to act upon petitions of this kind was notwithstanding asserted by the District Court of Southern New York in the matter of *Joseph M. Lane*, 3 Benedict, 98. In the opinion of *Judge Blatchford*, the power of the register to make an order, upon the petition of the solicitor for the bankrupt, directing the assignee to pay certain fees of officers, was embraced within the power given by sec. 4, "To make all computations of dividends and all orders of distribution," and "to audit and pass accounts of assignees;" and under the power given him by general order No. 5, to conduct proceedings in relation to "taking evidence concerning expenses and charges against the bankrupt's estate, auditing and passing accounts of assignees, and proceedings for the declaration and payment of dividends."

This case was followed by my learned predecessor in re *Noyes*, 6 B. R., 277, where the question arose upon the application of the assignee for the settlement of his account, and the power of the register to hear such application was affirmed. In the case of *Myron Rosenburg*, 3 B. R., 73, the attorneys for the bankrupt applied to the register for an order of payment by the assignee of the bill of items of disbursements for clerk's, register's and marshal's fees, etc., to which the assignee objected that the bankrupt had paid his attorneys a sufficient sum to cover those items. In this case *Judge Blatchford* held that the matter should be brought before the court by petition, which would then be referred to the register to take testimony. This was probably because the application was contested. Whatever doubts may have existed under general order No 5, prior to April, 1875, with respect to the power of the register in uncontested matters of this kind, are resolved by the amended order adopted at that date.

By this order the power already given to the Supreme Court by sec. 4, and never, until then, exercised, was assumed by the Supreme Court, and the duties of the register extended to the despatch "of all administrative business of the court in matters of bankruptcy, and making all requisite uncontested orders therein, which are not, by the acts of Congress concerning bankruptcy, required to be made, done or performed by the district court itself," subject, however, to the control and review of this court. By the amendment of general order No. 8, adopted at the same time, it was provided that "if any party interested adversely to such order shall not, before the hearing of the application therefor, give reasonable notice in writing to the register that he intends to contest the same, and objects to its being heard by the register, the same shall be heard by the register as by consent." The language could scarcely be broader. It applies to all uncontested

orders concerning the winding up of the bankrupt's estate, which are not required to be specifically made by the court, and I think clearly embraces the petitions in question.

The exceptions to the decision of the register are therefore sustained, and an order will be entered directing him to act upon the petition in each case.

In Re Elias G. Williams—In Bankruptcy.

1. An attaching creditor may intervene to contest an adjudication upon the merits as well as to claim the court has no jurisdiction of the case.

2. Creditors who have obtained a preference by a bill of sale from the debtor are estopped to set up the execution of the same as an act of bankruptcy.

3. Creditors who have taken possession of the entire property of a debtor under a general assignment or bill of sale, intended to prefer them, are estopped to claim as an act of bankruptcy the non-payment of commercial paper maturing within forty days prior to such assignment.

4. An attaching creditor is a privy to the estate of his debtor, and is entitled to the benefit of such estoppels.

On Petition of William W. Crapo, Attaching Creditor, for Leave to Intervene and Contest the Bankruptcy Proceedings.

A petition was filed against Williams on the 13th day of December, 1875, by a number of creditors, praying for his adjudication as a bankrupt, and setting forth as acts of bankruptcy the transfer of his property by a bill of sale to the Citizens' National Bank of Flint, and also the non-payment and suspension of commercial paper. On January 3d, William W. Crapo, an attaching creditor, filed his petition, setting forth that on the 16th of October he took out a writ of attachment from the State court, and seized certain property of Williams; that upon the same day a bill of sale was made by Williams to the Citizens' National Bank, and placed on file in the City Clerk's office, but not until after the property covered by the bill of sale had been seized upon petitioner's attachment; that the bill of sale covers all the property of Williams liable to execution; that four of the petitioning creditors were officers of the bank at the time the bill of sale was given; that they and two others transferred their claims to the bank, and that the bill of sale was taken by the bank partly to secure the same; that at the time of giving the said bill of sale, and also upon the day the creditors' petition was filed, Williams was indebted in the amount of over $45,000; that 435,000 feet of lumber in Williams' possession was claimed by other parties, who replevied it three days after the petitioners' attachment was taken out; and that on the day following the replevin, the bank, claiming this same lumber under its bill of sale, itself replevied the lumber

back again; that petitioner obtained judgment on the 21st of December, for $2,249.13, and immediately levied his execution upon the property, by virtue of which he now holds it. Petitioner further alleges that five of the creditors have undertaken to defeat his claim under the attachment by asserting their lien under the bill of sale, and have combined with Williams to procure an adjudication and thereby work a dissolution of his attachment, and that the creditors' petition was filed collusively and for that purpose. He further claims, and it is admitted, that excluding these five petitioners there are not the requisite number of creditors named therein; that these five, having procured or assented to the taking of the bill of sale, are estopped from setting up the assignment as an act of bankruptcy, and, holding their lien, are not proper petitioning creditors. He further sets up that the bank and one petitioner procured the bill of sale and the transfer from Williams to the bank of all his property, money, credits and effects, to secure the payment of the note set out in the creditors' petition, the non-payment of which is alleged as an act of bankruptcy, and that by the taking of the bill of sale by the bank, Williams was deprived of the means of paying the note, and the bank and Hamilton thereby obtained the means of said Williams with which payment of said note could have been made within the forty days; he therefore claims that the petitioning creditors have no right to set up the non-payment of the note as an act of bankruptcy, and that said non-payment is not an act of bankruptcy. He further states that he has acquired a lien by his attachment upon the property of the bankrupt, which will be destroyed by an adjudication, and prays that he may be let in to contest the proceedings.

Griffin & Dickinson, for the petitioning creditors.
M. E. Crofoot and *Alfred Russell*, for the intervening creditor.

Brown, J.: It has aleady been held by this court, in the case of *Bergeron*, 12 B. R., 385, that an attaching creditor has the right to intervene and contest the jurisdictional allegation of the petition as to the number and amount of creditors. All the cases up to that time are cited in this opinion. Since then, however, the same question has been similarly decided by the district judge of the eastern district of Wisconsin, *in re Hatje*, 12 B. R., 548. It is claimed, however, by the petitioning creditors in this case that, although he may have the right to intervene to object to the jurisdiction, he cannot be permitted to contest the case upon its merits; in other words, he cannot intervene for the purpose of showing that no act of bankruptcy has been committed; and it is suggested that all of the cases where an intervening creditor was permitted to appear turned upon the alleged want of jurisdiction in the court, and that no authority is found for the position that he may intervene to put in issue the act of bankruptcy. On the contrary, however, in the case of *Brewster v. Shelton*, 24 Conn.,

140, the attaching creditor was permitted to come in and claim that the proceedings were collusive as to him, precisely what is claimed in this case; and in the cases of *Mendelssohn*, 12 B. R., 533, and of *Jack*, 13 B. R., 296, the attaching creditor was permitted to contest the question of merits. No distinction in principle is perceived. The attaching creditor has an interest to protect. By the adjudication, his attachment is *ipso facto* dissolved, and he has a right to inquire whether an act of bankruptcy has in fact been committed, as well as whether the court has jurisdiction to entertain the petition. Underlying all the discussion upon this subject is the general principle of law, that no man shall be deprived of his property without the opportunity of being heard. An assumption of this kind is at war with our whole system of jurisprudence.

The question next arises whether the petitioning creditors are not estopped to claim the bill of sale, set forth in the petition as a preference, to be an act of bankruptcy. The intervening petition sets forth (and for the purposes of this motion it must be taken as true) that four of the petitioning creditors were officers of the bank to which the bill of sale was made, at the time the same was executed; that they and two others of the petitioning creditors transferred their claims set up in the petition to the bank; that said claims were held by the bank at the time the bill of sale was taken and constituted a part of the claim named in the bill of sale which it was taken and intended to secure, and that said security was procured with the consent and at the instance of these creditors, and that they were not entitled to be represented in the petition. It further sets forth that five of these creditors, acting for themselves and the bank, have undertaken to defeat petitioner's claim under his attachment by asserting their lien under the bill of sale, and have combined with Williams to procure an adjudication and thereby to work a dissolution of petitioner's attachment lien.

The law is as well settled in bankruptcy as in equity that the party who has become a party to, assented or taken benefit from a fraudulent conveyance is estopped thereby to claim the same as a fraud or an act of bankruptcy. A party cannot thus take advantage of his own wrong. As observed by Judge Leavitt, *in re Langley*, 1 B. R., 565, "the well known doctrine of estoppel is undoubtedly applicable in such a case, if the facts justify its application. It would be clearly in violation of good morals as well as of law that one should give his assent and approval to an act and afterwards, for his own advantage, denounce the act as illegal and immoral."

In the case of *Schuyler*, 2 B. R., 549, creditors who had assented to a transfer from a common law assignee for the benefit of creditors to another assignee, were held estopped from questioning the original assignment. See, also, *in re Spicer*, and *Peckham v. Ward*, 3 B. R., 512; *in re Mass. Brick Co.*, 5 B. R., 408; *Bamford v.*

Barron, 2 T. R., 594, note; *Hicks v. Burfitt*, 4 Camp., 435, note; *ex parte Kilner Buck*, 135; *ex parte Cawkwell*, 19 Ves., 233; *Buck v. Gouch*, 1 Holt, 13.

I think it entirely clear in this case that the creditors whose claims are secured by this bill of sale would be estopped to claim its execution as an act of bankruptcy.

The only other act charged is the suspension and non-payment of a note dated July 15th, 1875, payable sixty days after date to the order of William Hamilton. The intervening petition further sets up that the bank and the petitioner Hamilton procured a transfer from Williams to the bank of all his property, money credits and effects to secure the payment of this note, and that by such transfer Williams was deprived of the means of paying the same, and the bank and Hamilton thereby obtained the means with which payment of such note could have been made within the forty days, and therefore that the petitioning creditors have no right to set up the non-payment of the note as an act of bankruptcy. Though it was clear that Williams could not, as against creditors not assenting thereto, set up the assignment of his property for the benefit of creditors as an excuse for the non-payment of his commercial paper, still I think the creditors who have procured such assignment, and thereby taken the means by which Williams might reasonably be expected to pay the note, are as much estopped to claim the non-payment of the note as an act of bankruptcy as they are to claim the assignment itself to be such.

But it is insisted that, granting that the debtor might claim these estoppels, the same defense cannot be made available in the hands of the intervening petitioner. The general rule is unquestioned that only parties to deed and those in privity with them can be bound by it or take advantage of the estoppel created by the instrument.—*Bigelow*, 269.

It only remains to inquire whether Crapo is a privy to the estate of the debtor within the meaning of the law. The term privity, says Prof. Greenleaf, Sec. 189, "denotes mutual or successive relationship to the same acts of property." Such relationship may be cast upon the privy by the voluntary act of the party, or by the act of the privy himself, proceeding in hostility to the party. Privies in estate exist where there is a mutual or successive relationship to the right of property, not occasioned by descent or by act of law (*Freeman on Judgments*, Sec. 162). Privies in estate are simply distinguished from strangers, and the manner in which the party became a privy, so long as the relationship exists, is of no moment. In the case of *Parker v. Crittendon*, 37 Conn., 148, the plaintiff bought a hack in the possession of a third person as belonging to him. The real owner was present and assented to the sale. Subsequently it was attached as his in the hand of the plaintiff, who now brought replevin. The court held him entitled to recover. The defendants, it was remarked, by claiming through the owner under the attachment,

were privies in the estate with him and bound by the same estoppel. See, also, *Bigelow*, 493.

Similar questions have frequently arisen under the usury laws of the State of New York. In the case of *Dix v. Van Wyck*, 2 Hill, 522, it was held that, although a deed or contract cannot be avoided for usury by a mere stranger to the transaction, a judgment creditor, by selling the property of his debtor on execution, might place himself in the situation of a privy and contest the validity of any prior lien affected by usury. The case was replevin against a sheriff for goods taken on execution, the plaintiff claiming under a prior mortgage executed by the judgment debtor, and it was held that the sheriff might show the mortgage usurious as a defense to the action. The court observes that "the purchaser under a judgment and execution is an assignee by operation of law, and so stands in legal privity with the judgment debtor. We have not been referred to any case, nor have we met with one which denies that an execution creditor may seize and sell the property of his debtor and thus try the validity of any prior charge or encumbrance on the ground of usury." Similar views were expressed by the chancellor in the case of *Post v. Dart*, 8 Paige, 640, where it is observed that "a usurious mortgage is void, not only as to the mortgagor, but as to all others who succeed to his rights in the mortgaged premises, either by operation of law or otherwise. A judgment creditor, therefore, whose judgment becomes a legal lien upon the whole interest of the mortgagor in such premises, may, by a sale and purchase under his judgment, obtain a perfect title to the land, and may then enjoy the same as fully as the judgment debtor might have done had he continued to be the owner."

In *Mason v. Lord*, 40 New York, 476, it was held an assignment of a lease, absolute on its face but in fact given as security for a usurious loan, might, in the hands of a purchaser of such lease from the usurious assignee, with notice that the original assignment was security for a loan, although without notice of its usurious character, be avoided for usury by a judgment creditor of the original lessee. All those cases were reviewed in *Carow v. Kelley*, 59 Barb., 239, where it was held a chattel mortgage could be avoided for usury by a judgment and execution creditor of the mortgagor. The general doctrine was there asserted, that a person who, like an execution creditor, asserts a lien upon mortgaged property is not a stranger within the meaning of the rule, that the defense of usury is a personal one, and cannot be pleaded by one having neither privity of estate nor of blood with the borrower, that is to say, by a mere stranger.

As the intervening petitioner claims title to the property in question by an attachment duly levied upon it, I think he stands in the relation of a privy and may take advantage of any defense available to the debtor, and his motion for leave to intervene is therefore granted.

WESTERN DISTRICT OF MICHIGAN.

Quackenbush v. Lane.

1. In a foreclosure cause, where the mortgage contains the usual interest clause giving the mortgagee the option to consider the whole amount due after default for thirty days in the payment of interest when due, decree is granted for the full sum, though the bill does not allege option by the mortgagee and notice.
2. The mortgagee exercises his right and signifies his choice by bringing suit for the full amount and the suit is sufficient notice.

Suit to foreclose a mortgage containing the usual interest clause, that if any installment of interest or principal shall come due and remain unpaid for thirty days, the whole sum secured shall be due and payable at the expiration of said thirty days, at the option of the mortgagee.

WITHEY, J.: *Held*, that it is no objection to granting a decree for the full amount secured that the bill does not allege option by the mortgagee and notice. It is sufficient that default for more than thirty days in the payment of an installment is alleged, that the default continues, and that the bill claims a decree for the whole sum secured.

"Option," in the instrument, imports a right to choose and an exercise of that right. The mortgagee exercises his right and signifies his choice by suing for the whole amount, and suit is sufficient notice of his choice, upon like principle that suit upon a note payable on demand is a sufficient demand of payment.

Lowell National Bank v. James C. Train et al.

1. Under the Michigan statute (Comp. L., §§ 6199, 6201), providing for separate compromises of partnership debts with individual members of the firm, the remaining partners of the firm who do not compromise cannot be held liable to the creditor, for any more than the balance due him, though their joint ratable proportion of the whole debt exceeds that balance.
2. They would be liable, under sec. 6202 to their co-partners, who by compromise paid more than their proportion, to make contribution, and this shows that their liability to the creditor must be limited in such case to the balance of the debt unpaid.

Champlin, Butterfield & Fitzgerald, for plaintiff.
Holmes & Stone, for defendants.

WITHEY, J.: Sixty-seven persons associated by articles under the name of the "Lowell Horse and Agricultural Association," and subscribed $37,000 stock. No attempt was made to create an incorporated company under the State law, and no assertion of corporate rights or powers. The persons were held to be partners. The Association owed the Lowell National Bank $5,500 and some accrued interest. Some of the partners were pecuniarily responsible, while others were not responsible. The bank offered a compromise to any who should pay a given rate per cent which, on the basis that there was $20,000 of responsibility represented, would meet the debt.

Thirty-seven paid the required sum upon that basis and received discharges. By this process the debt was paid, less $803.69, and this suit was commenced against the remaining thirty members not accepting the terms of compromise, to recover whatever balance the bank was entitled to have. At the trial in October plaintiff claimed a verdict for $2,878, that being, in the language of the statute, "their joint ratable proportion" of the original debt for which defendants would remain liable. By consent a verdict was entered for that amount, subject to be reduced upon a motion for a new trial as the opinion of the court should require.

Sections 6199 and 6201 of Compiled Laws contain the controlling provisions, and are substantially in harmony with each other. The former reads: "Provided, however, that in case of such settlement or compromise, the copartners who are not parties to the same shall be discharged from liability to the creditors, *except for their joint ratable proportion of such copartnership debt.*"

By sec. 6201 they are not to be considered as discharged from liability to the creditor except as above provided, *i. e.* "except for their joint ratable proportion of such copartnership debt."

It is not ascertained that any construction has been given in this State to the statute in question, nor in other States where like legislation exists. A literal construction of the language of the sections referred to would support plaintiff's claim, viz: that the non-compromising debtors are not discharged "except for their joint ratable proportion of the copartnership debt." That construction would lead to this result: If one of three members of a firm settles by compromise and pays two-thirds of the partnership debt in discharge of his liability, the other two partners remain liable to the creditor for two-thirds of the debt when but one-third remains unpaid, because two-thirds is their joint ratable proportion of the original indebtedness. It may be doubted if the Legislature could give a creditor the right to enforce collection beyond the balance remaining unpaid, in any event; but we think no such purpose was designed. It is a cardinal rule of construction that the intention of the law-maker constitutes the law. The manifest object of the statute must control, and not the absurd results which would flow from its literal rendering.

We hold that the defendants, who did not compromise, remain liable for the balance of the joint or copartnership debt, not exceeding their joint ratable proportion of the original indebtedness. If those who did compromise have paid more than their joint ratable proportion of the debt, then those who did not compromise remain liable to the creditor only for the balance still unpaid, even if their ratable proportion would exceed the balance remaining unpaid. Under section 6202 they would be liable to their partners who, by compromise, paid more than their proportion, to make contribution, and this shows that their liability to the creditor must be limited to the balance of the debt unpaid when that balance is less than their joint ratable proportion.

Upon remitting the damages in excess of $803.69, plaintiff will be entitled to enter judgment for that sum.

Supreme, Circuit, Chancery and Superior Court Rules of Michigan.

READY JANUARY 21, 1877.

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STATE OF MICHIGAN.

SUPREME COURT.

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Agreement to Carry:—Articles of Merchandise:—Damages:—Difference in Cost of Transportation:—Agency:—Evidence:—Statements:—Inferences.

WARD'S CENTRAL & PACIFIC LAKE CO. vs. HENRY K. ELKINS. Error to Superior Court of Detroit.

Moore, Canfield & Warner, for plaintiff in error.
Alfred Russell, for defendant in error.

CAMPBELL, J.:

Elkins recovered damages against the plaintiff in error for failure to carry certain salt from Bay City to Chicago, in November, 1874. Elkins was a salt dealer in Chicago, and sued upon an alleged contract by plaintiff in error to carry three cargoes of salt, of about 17,000 bushels in all, only one of which was taken. The cargoes were to be called for from the 15th to the 20th of November. The regular business of the company was between Buffalo and Duluth, with power, as was claimed, to do business elsewhere on the lakes. Evidence was given tending to show that plaintiff could not get vessels to carry the salt after defendant's default; that he had it taken by rail in lots as he wanted it, from January to April, 1875. He was allowed to recover the difference

between the price agreed on with defendant and what he paid for the transportation by rail. This is the chief error alleged.

Held, 1. That this rule of damages is erroneous; that the salt being but merchandise, and valuable only as such, the proper measure of damages was the excess of the value of salt in the market in Chicago when it should have arrived there, beyond what it was worth in Bay City and the expenses of transportation, and that if there was no such excess in value, then the plaintiff was not damaged; that if the railroad prices would have rendered it unprofitable, he would not be justified in procuring it to be transported in that way; that the difference in cost of transportation can never be the proper measure of damages for breach of any agreement to carry ordinary articles of consumption always to be found in the market, and only valuable to the owner for their merchantable qualities; that a person has no right to put others to an expense of such a nature as he would not, as a reasonable man, incur on his own account.

Held, 2. That the statements of a steamboat clerk, who was not shown to occupy any position of general agency, were improperly received in evidence to bind the company.

Held, 3. That questions were improperly allowed, calling for the inferences of the witness, rather than the actual terms of the contract in suit.

Judgment reversed, with costs, and new trial granted.

Swamp Lands:—Act of Congress:—Land Grant:—Sales by United States:—Title from State:—Intervening Rights:—Exceptions from the Grant:—Equity Jurisprudence:—Bill to Quiet Title:—Pleadings:—Estoppel.

GILBERT DALE vs. JAMES TURNER et al. Appeal in chancery from Eaton Circuit.

E. A. Foote and *P. T. Van Zile*, for complainant.
Crane & Montgomery, for defendants.

GRAVES, J.:

Complainant, being in possession of a parcel of land, and defendants having brought ejectment, filed this bill to enjoin the ejectment suit, and to subject the question of the adverse claims of the parties to decision in equity. The complainant claims through several mesne conveyances under one Britton, who, in March, 1852, made an entry thereof at the U. S. Land Office, under a military bounty warrant, and received a certificate of purchase and took possession. The defendants claim as purchasers

from the State, under a patent regularly issued to them in 1873. The question involved is, whether by the swamp land act of Congress of September 28, 1850, and the subsequent acts, and the legislation of the State in reference thereto, the title to this parcel was transferred to the State at the time Britton's rights attached.

Held, That while the swamp land act of 1850 was sufficient to work an immediate transfer of the class of lands to which it was applicable, yet it was competent for the United States and the State, the parties to the grant, to agree, in the absence of any conflicting right, that sales made by the United States subsequent to the passage of that act should be respected by the State, and be left to be completed by the former by conveyance, and that the State should resort to the United States for equivalent; and that the effect of the legislation on the subject, and the action taken under it, was to establish an arrangement in the nature of a compact or special bargain, that such sales as that to Britton should not be invalidated by the operation of the act of Congress in question; and that the lands involved in this suit were thereby lawfully taken out of the category of swamp lands embraced in said grant, and that therefore they were not subject to sale by State authority in 1873, when defendants purchased and received their patent.

A question is made whether complainant, under the circumstances, should be permitted to come into equity to assert his right, and obtain protection against the hostile claim of defendants.

Held, That whether or not, if the case depended on the scope of the routine jurisdiction of the equity courts, this would be admissible, the case comes within the scope of the statutory remedy provided for quieting title to lands.—*Comp. L. 1871, sec. 5072.*

It is objected that if complainant's right should be found complete, still there were special circumstances sufficient to estop him from maintaining it in this court.

Held, 1. That it is a sufficient answer to this defense that it is not specifically set forth in the pleadings as a ground of defense.

Held, 2. That the special facts set up in the answer, viz: that one alleged to be complainant's solicitor, urged the bringing of the ejectment suit, and represented that complainant was aware he had no title, and was desirous that an ejectment should be prosecuted to judgment to enable him to have recourse against his warrantor, were insufficient to make out an estoppel, and that the further facts proved, and not set forth in the answer, could not avail the defendants.

Decree below reversed, with costs of both courts, and one directed to be entered perpetually enjoining the ejectment suit, and requiring the defendants to release to complainant.

Ejectment:—Equitable Estoppel:—Evidence:—Legal Title:—Estoppel in Pais:—Statute of Frauds.

MARTIN HAYES vs. STILLMAN LIVINGSTON. Error to Montcalm Circuit.

William O. Webster, for plaintiff in error.
Mitchel & Pratt, for defendant in error.

COOLEY, CH. J.:

Livingston recovered in ejectment on the strength of an estoppel *in pais*. His case was that Hayes, whose title to the land at a former time was conceded, had given two mortgages upon it, one of which had been foreclosed under the power of sale, and the land sold to a third party; that the other being held by one Corey, an arrangement was made between him and Hayes, under which Corey was to buy up the title under the foreclosure, and then when he should be able to find a purchaser, sell the land, and from the proceeds take out the amount of his mortgage and the amount he should have paid for the foreclosure title, and pay over the remainder to Hayes; that this arrangement was carried out so far as concerned the purchase of the foreclosure title, and that subsequently Corey sold to Livingston, being first told to do so by Hayes, and Livingston not making the purchase until assured by Hayes that the land was Corey's, though the latter was to pay over to Hayes a surplus from the purchase price when the sale was made. This case was disputed by Hayes, who claimed that whatever was paid by Corey in acquiring the foreclosure title was only a loan, to be repaid with interest. The foreclosure title, however, proved to be defective, and left the legal title in Hayes. But Livingston insisted that Hayes, by his arrangement with Corey, and by telling Livingston after Corey bought that the latter was owner, had estopped himself from setting up any title in opposition to that which Livingston had acquired in reliance upon his own statement; and the circuit judge so ruled. The jury found the facts to be as claimed by Livingston, and a verdict and judgment was rendered accordingly

Held, That if the rule of estoppel *in pais* were the same, when the rights to real property is involved, as it is where only personalty is in question, the ruling in question would undoubtedly be correct, but the statute of frauds providing that no interest in lands, with certain exceptions, shall be created or transferred otherwise than by deed, necessitates some considerations which are not involved in the case of personalty; that while there are authorities both ways on the question involved, it cannot be said that the weight of authority is with the ruling below, unless the cases of settlement of boundary lines and those of dedication are in point, and that settlements of boundary lines, when acquiesced in, are supported for the very reason that they pass no title, but

only define what it is that the title embraces, and that cases of dedication are foreign to this question, and do not involve considerations arising from the statute of frauds; that cases in equity, or cases where under statutory provisions equitable defenses are permissible at law, have no necessary bearing, but that equity may always compel the owner of the title to release it when that is proper redress for a fraud committed by him in respect to the title, and the remedy is properly administered by compelling the fraudulent owner to convey, instead of treating the case as one of estoppel in the strict sense; that so long as, and wherever the distinction is kept up between legal and equitable remedies, and especially under legislation which confines the action of ejectment to the legal title alone, it is not admissible to allow the legal title to be defeated by an equitable estoppel, or by proof simply of superior equities, though sufficient to prevail in a court of equity; and that, moreover, apart from all authority, the reasons against such an application of the doctrine of estoppel appear to be entirely conclusive; and that the effect of the ruling in this case was to permit the best evidence of title to be overcome and be set aside by the weakest; that the evils against which the statute of frauds was aimed are all here in their most threatening form, and it is trifling with that statute to refuse to apply it to a case clearly within its spirit, when in order to exclude it from the letter it is necessary to put the title out of view, and deny that it is involved, though the decision is effectual to dispose of it.

Judgment reversed, with costs, and new trial ordered.

Criminal Law:—Examinations:—Specifying the Offense:—Murder:—Manslaughter:—Information:—Letting to Bail.

GEORGE W. YANER vs. THE PEOPLE. Error to Ionia Circuit.

Mitchel & Pratt, for plaintiff in error.

A. J. Smith, Attorney-General, for the People.

MARSTON, J.:

The plaintiff in error was arrested, examined and held for trial upon a complaint charging him with having committed the crime of murder. An information containing a similar charge was filed in the circuit court, upon which he was tried, found guilty of manslaughter, and sentenced to the State prison for seven years. Before pleading, a motion was made on behalf of the respondent to quash the information, on the ground that it affirmatively appeared that the examining magistrate refused to determine whether the facts proved on the examination amounted to manslaughter or murder.

Held, That the examination of persons charged with offenses not cognizable by a justice, was designed to take the place of a presentment by the grand jury, and the law was always strict in requiring grand juries to be definite and specific in relation to the offense charged in the indictment, and the indictment could not be amended by the prosecuting attorney, nor could the accused be tried for another and different offense than the one charged; and that the legislature, in permitting examinations instead of indictments, did not intend thereby to deprive a person accused of crime of any substantial right which previously existed; that where the crime charged in the warrant includes one or more of a less degree, the magistrate should determine which offense, if any, had been committed, so that the accused might not be placed upon trial in the circuit for an offense different or greater than that upon which he had been examined and held for trial; that persons charged with crime being entitled of right to be let to bail, except for capital offenses or for murder in the first degree where the proof is evident or the presumption great, the magistrate must, upon the examination, determine whether an offense has been committed, and must specify it, so that it may be seen whether the offense be one bailable by him or not, and that he may not, by declining to specify the offense, deprive the accused of bail; and that the return of the magistrate here affirmatively showing that he refused to determine whether the proof would amount to murder or manslaughter, it is clear that he did not determine from the evidence adduced upon the examination that the offense was murder, or that there was probable cause to believe the accused guilty of such an offense, and that the motion to quash should have prevailed.

Information quashed, judgment set aside, and prisoner discharged.

Chattel Mortgages:—Goods Subsequently Acquired:—Power:—Condition:—Confusion of Goods:—Trusts in Personal Property:—Specific Property:—Breach of Condition:—Seizure:—Subsequent Purchaser:—Notice:—Insurance:—Evidence:—Statements of Agent.

SAMUEL G. LELAND et al vs. PETER H. COLLVER et al. Error to St. Joseph Circuit.

David Knox, Jr., for plaintiffs in error.
R. R. Pealer, for defendants in error.

CAMPBELL, J.:

Plaintiffs in error sued defendants in error in trover, for the conversion of certain furniture, which had been the stock in trade

of plaintiffs. Defendants justified under a chattel mortgage, dated July 3, 1870, made by Emanuel Shnyder to defendants Illenden & Collver, to secure $2,000, and interest at ten per cent annually, $1,000 in two years and $1,000 in three years from date, and given for the purchase price of the stock of goods mentioned in it. The property mortgaged was thus described: "All the goods, wares and merchandise, chattels and effects mentioned and described in the schedule hereto annexed, and marked 'Schedule A,' this day bought of Illenden & Collver, thereby intending to convey all the present stock in trade as enumerated in said schedule, also all the stock I may have from time to time in trade, as security for the above named consideration, said goods to remain and continue in the possession of the party of the first part, in the village of Three Rivers, Michigan, except as they are disposed of in the usual course of retail trade; the party of the first part is to have the privilege of selling the goods for cash or on credit, in the usual course of trade, and is to apply the proceeds of the sales in buying other goods to keep up the stock, and to the support of his family. The party of the first part covenants to keep up a stock of like goods to the value of $3,000, as security to the parties of the second part, until the above amount, with interest, is paid, and also covenants to keep the stock insured to the amount of $2,000, for the benefit of the party of the second part, and as collateral thereto, and a breach of the last two covenants shall cause the whole sum secured to become due and payable." The mortgage also provided, as among the acts that would authorize a seizure and sale, that "if the said party of the first part shall sell, assign or dispose of, or attempt to sell, assign or dispose of the said goods and chattels, contrary to the terms of these presents, or remove or attempt to remove" them, etc., "or if the insurance is not kept up, or if the stock is sold below the amount covenanted to be kept up," etc. Shnyder, after making this mortgage, continued in business, alone and with partners, till August 30, 1871, when he sold out his interest in the firm of Shnyder & Bellows to one John Koahn, who afterwards bought out Bellows also, and continued in business alone till November 11, 1871, when he sold out to the plaintiff Nancy Moore, giving an inventory which was declared to be "subject to a chattel mortgage." There was no other chattel mortgage than the one in question. The other plaintiffs became partners with Nancy Moore, and during their continuance in business they added $344 worth of goods purchased from other parties, and sold about $1,500 worth at retail. Illenden & Collver seized the stock under their mortgage, Feb. 22, 1872, and sold it. The property sold included some recent purchases and unfinished articles. But a small part of the property was in that originally sold by Illenden & Collver to Shnyder. Alfred B. Moore, husband of Nancy Moore, acted for her in making her original purchase, and in superintending all her business,

in which she did not act personally for herself at all. All the persons who became interested in the stock of goods took with notice of the chattel mortgage, and bought subject to it.

Some question seems to have arisen concerning the effect of a confusion of goods by intermixture.

Held, That it would be difficult to create such a confusion among such articles as those in controversy, and that it does not appear in fact that any serious difficulty was found in distinguishing the property.

On the main question, whether the mortgage gave the mortgagees authority to seize and subject the property to sale, and to make good title under the power of sale, no one intervening with a valid claim or title created prior to the seizure, the court

Held, 1. That the mortgage was valid and operative according to its terms; that parties can, if they choose, make contracts of agency, bailment, or other authority, as broadly as they please, where no legal policy and no paramount right intervenes before their enforcement, and if those agreements contain a license or permission to take possession and sell, no court can deny the validity of the possession and sale, if the parties are capable of contracting, and no other rights intervene; that trusts in personal property are of every day occurrence, in which the specific property is constantly changing, while the fund remains subject to the duties and burdens of the trust; that the agreement in question here is fair and intelligible, and it is as easy to identify this fund as any other which changes its shape, but not its legal identity, by reïnvestment.

Held, 2. That a purchase of property subject to such a power would certainly be regarded in equity as liable to be subjected to a disposition in furtherance of the trust, and every one taking on these terms becomes in equity a trustee of the fund.

Some questions were raised concerning the right to foreclose before the maturity of the mortgage.

Held, That while in the early part of the mortgage the covenants to insure and to keep up the stock are united, it is very doubtful whether this by itself technically requires a double breach, and that, moreover, the mortgage must be read as a whole, and in the proviso or defeasance, where it is proper to look for the careful statement of the mortgagor's rights, there is no ambiguity, and the remedy is there expressly given on a breach of either one of the two conditions.

The court below instructed the jury that the condition as to a sale, except at retail, without written consent, might be waived, but that they could not find such a waiver unless they found the property was sold with the knowledge and consent of the mortgagees. This instruction is complained of.

Held, That this was going as far as could be asked, and that if the jury have not taken a proper view of the testimony, their course cannot be reviewed in this court.

Objection was taken to evidence of the insurance of the property by the mortgagees for their own protection.

Held, That where there is a covenant to insure, and it is not kept, the mortgagees may very properly insure, and can add the premium to the mortgage debt, if fair and reasonable.

Objection was also made to the reception of testimony of certain remarks of A. B. Moore, the husband of the plaintiff Nancy Moore, as not *res gestae*, and therefore not competent. These remarks consisted of declarations that he had got a whip row on Illenden & Collver, and intended to keep it, and that the mortgage was worthless, and he was going to beat them out of it if he could. It appeared that Mrs. Moore was practically a cipher in the transaction, and that Moore had entire control, and did as he chose.

Held, That the evidence in question was admissible, as tending to show notice of defendants' rights, and such conduct as would justify them in proceeding to an enforcement of them; that under the circumstances it was admissible to urge and to assume that she knew what he knew, and intended what he intended, and perhaps, too, that she was merely a figure-head, and her husband the actual dealer; that where husband and wife are engaged in business on such terms, the admission of the proof of the husband's conduct will not be held error unless evidently foreign to the issue and to his authority, and plainly prejudicial in its tendency, and that the evidence in question here could not have prejudiced any one, except on grounds which made it legally admissible as conduct which it was material to show.

Judgment affirmed, with costs.

Court Rules:—Defaults:—Ten Day Rule:—Superior Court of Detroit.

WYANDOTTE ROLLING MILLS CO. vs. WILLIAM D. ROBINSON.
Error to Superior Court of Detroit.

Moore & Moore, for plaintiff in error.
Griffin & Dickinson, for defendant in error.

GRAVES, J.:

The defendant in error obtained judgment against plaintiff in error by default, in a suit commenced by declaration. The default was entered for want of plea, after the lapse of ten days from the service of the declaration. This was done by virtue of a rule adopted by the court below, without the sanction of this court, which it construes as authorizing such default and judgment. A point is made on the proof of service, and also on the proper construction of the rule in question, but these are not con-

sidered, but the case is determined on the assumption that the construction put by the court below on its own rule is correct.

Held, That for many years it has been the clear policy of the State to secure uniformity in all the tribunals of the same class in all matters of practice, and the constitution (Art. VI, sec. 5) provides that the Supreme Court shall by general rules establish, modify and amend the practice in that court and in the Circuit Courts, and the legislature has in various ways acted upon the same idea (and reference is made to instances of such legislation), and has, in reference to many things not beyond the scope of court regulation, made specific regulations by statute (of which several instances are cited); that while there can be no doubt of the power of every court of record, when not forbidden, to ordain suitable rules to apply to matters of practice not already regulated by the legislature or the Supreme Court, yet the commencement of suits by declaration is a statutory innovation, and the time to be allowed defendants for pleading is expressly fixed by statute at twenty days, and no Circuit Court can abridge it, and the Superior Court of Detroit is a tribunal of the same class, and the subjects of its jurisdiction, so far as it extends, are of the same nature as the Circuit Courts, and there is no good reason for permitting it to do that which is prohibited to them in this regard; and that the Superior Court act does not authorize it to adopt and enforce a rule shortening the time prescribed by statute for pleading to declarations served as commencement of suit.

Judgment reversed and the default vacated, with costs, the cause being open to be proceeded in according to law.

Partnership: — Creditor: — Agency: — Husband and Wife: — Promissory Notes: — Fraud: — Payment.

FRANKLIN MOORE vs. ELLEN L. FOOTE. Error to Superior Court of Detroit.

Meddaugh & Driggs, for plaintiff in error.
William Jennison, for defendant in error.

COOLEY, Ch. J.:

This cause is brought up for review upon the following finding of facts and law:

1. On June 13, 1874, defendants were partners in trade and had been for more than eight years prior thereto, doing a wholesale grocery business in Detroit, under the name of Moore, Foote & Co. The plaintiff is wife of defendant Foote. On the date above mentioned defendant Foote signed and executed in the firm name a certain promissory note for $3,236.10 of that date, payable on demand to the order of Ellen L. Foote, with interest at 10 per cent after maturity.

2. On December 6, 1870, defendants, being indebted to plaintiff in the sum of $1,203.03, gave her their promissory note, signed in the firm name, of that date and for that amount, payable on demand. The amount due on this note was reduced by successive endorsements so as to leave a balance due thereon, December 20, 1872, of $933.03. On December 2, 1872, defendants' firm executed and delivered to plaintiff its certain other promissory note, payable on demand for $252.63, being for interest due and unpaid on the last mentioned note. The two last notes both remained unpaid and were in the hands of and owned by plaintiff on June 13, 1874. Some time in 1873, defendant Foote, being the holder and owner of a draft on New York for $1,700, less exchange, viz: $1,697.04, loaned the same to the firm and received a non-negotiable due-bill at one day therefor, signed by the chief clerk of defendants, in their firm name. This loan was credited to Foote upon the cash blotter of the firm. Foote was at the time indebted to his wife, the plaintiff, for money previously loaned to him by her, in an amount exceeding the amount of said draft, and he transferred the due-bill to her in part payment thereof. Defendant Moore had no knowledge of such due-bill or of its transfer.

3. On said June 13, said two last mentioned notes and the due-bill being still unpaid, Foote received the same from plaintiff, and procuring the interest to be calculated by said clerk, surrendered them up to said clerk, and himself executed the note in suit for the amount thereof, and delivered the same to the plaintiff in lieu of the other notes and due-bill, none of the other defendants having knowledge of or assenting to the transaction, and no entry thereof being made upon the books of the firm by said clerk or any other person.

4. The note in suit was first presented for payment, to the receiver hereinafter mentioned, on April 12, 1875. It was never paid. The interest thereon from April 12, 1875, to this date, January 27, 1876, is $267.40. The total amount of said note to date, principal and interest, is $3,492.28.

5. In 1874, and for some years prior thereto, the affairs of the firm were in great confusion and the partnership thoroughly insolvent. A bill was filed June 24, 1874, by defendant Moore, for a dissolution of the partnership and a winding up of its business. Francis Palms was appointed receiver. Upon a statement of the accounts of the several defendant partners, Foote insisted upon and was allowed and credited in his account with the $1,700 so loaned as aforesaid by him to the firm. On January 16, 1875, defendant Moore came to an adjustment with Foote, by which Moore agreed, in consideration of receiving the assets of the firm, to assume the liabilities thereof, and gave bond to Foote to carry out such agreement and release him from all liability on the firm debts. At this time plaintiff's claim to the said money so loaned

did not appear upon any of the firm's books or papers, nor did Moore know of the same, or that plaintiff held the note sued upon, or that it had been given; the only claim of plaintiff which did appear on the books, or of which Moore had knowledge, was for the amount due upon said notes of December 6, 1872, and December 2, 1872. The plaintiff had no dealings directly with the firm, but only through her agent, defendant Foote.

As conclusions of law the court below found, (1) that the defendants were indebted to plaintiff in the total amount of the note in suit, viz: $3,492.28; and (2) that the plaintiff was entitled to judgment against the defendants for that amount and costs of suit to be taxed.

It is urged that this judgment consummated a fraud designed and perpetrated by George Foote upon his copartners and especially upon Moore, who has already allowed and paid said Foote the amount of the note in suit in full confidence that he was creditor of the firm to that amount and with no reason to suspect the contrary.

Held, That this may be true, and still Mrs. Foote be entitled to her judgment; that if the note is legally and equitably her property, she is not precluded from recovering upon it because of any incidental wrong the recovery may cause to another in consequence of the fraud of her husband to which she was in no wise a party.

It is urged that as the due-bill was not negotiable, a settlement by the firm with Foote without knowledge that it had been transferred would have constituted a complete defense to a recovery upon the note on her behalf: and that the case is made no better for Mrs. Foote by the taking up of the due-bill and the giving of the note in suit, because in that transaction Foote must be regarded as acting as agent as well for his wife as for the firm, and his wife must be chargeable with notice of the fact known to him that on the partnership books the amount still stood to his credit.

Held, That this method of charging the parties respectively with knowledge of what was known to George Foote would make the argument defeat itself: for, while Mrs. Foote would be chargeable with notice of the copartnership credit, the firm, on the other hand, would be chargeable with notice of the giving of the note to Mrs. Foote, and if Moore subsequently settled with Foote on the basis of Foote being entitled to the money, he would do so in his own wrong; but that Foote was in no proper sense his wife's agent in this transaction; that he was one of her debtors, and when he gave her this note on behalf of the firm as a substitute for the due-bill, his wife had a legal right to receive and rely upon it; that if Foote defrauded his associates, his wife is not responsible, she does not guaranty his good conduct, and she is entitled to all the rights of any other creditor.

Judgment affirmed, with costs.

Practice:—Mistakes of Jury:—Computation:—Interest:—Moneys Collected:—Payments:—Application:—Pro Rata Application:—Superior Equities.

HENRY M. YOUMANS vs. WILLIAM A. HEART. Error to Saginaw Circuit.

John J. Wheeler, for plaintiff in error.
D. W. C. Gage, for defendant in error.

MARSTON, J.:

Heart brought assumpsit against Youmans as surviving partner of Bundy & Youmans. Bundy, in his life-time, was a member of three firms: Bundy & Martindale, carrying on a shingle mill; J. F. Bundy & Co., carrying on the lumber business, except sawing; and Bundy & Youmans, owning and operating a saw mill and salt works. Heart had business in 1872 with the other two firms, but none with J. F. Bundy & Co. The shingle mill business was kept on a separate set of books, but the rest was all kept on Bundy's books; and all the bank business of all the firms was kept in Bundy's name. Heart had a written contract with Bundy & Youmans, whereby they agreed to saw for him a large quantity of logs, at an agreed price, and to pile the lumber on the dock, convenient for shipment. He also made an oral arrangement with them to sell the lumber for him, and receive the proceeds. The account was kept on Bundy's books in the name of J. F. Bundy & Co. A statement of account having been rendered, showing a balance in his favor, he insisted he was to receive interest on the balances due him. Another account was afterwards made out by a clerk, allowing interest at ten per cent, but this was not shown to have been authorized by Bundy. The account was reduced so as to leave $224.13 due January 1, 1874, exclusive of interest. There was then due Heart from Bundy & Martindale, exclusive of interest, $2,536.87. In April, 1874, Bundy gave Heart his two notes, endorsed by J. F. Bundy & Co., no application thereof being made by either party. Bundy died shortly afterwards, and these notes were paid by his estate. Heart presented his claim against both firms to the commissioners on claims, on the basis of an application of enough of the two notes to the account in suit to extinguish it, and credited the balance on the other account, but submitted with them a statement in writing that he did not thereby waive his rights to enforce and collect them of the firms respectively, or the survivors thereof. These claims being disallowed, suits were brought. The Bundy & Martindale suit being tried first, the court applied on that claim $1,688.67 of the two notes, and in the suit at bar the balance was applied on the other claim, and interest was allowed at seven per cent on equated averages prior to January, 1874. This allowance of interest, and the application made of the payments, is complained of.

It is also urged that the jury must have made a mistake in computing interest.

Held, That this is not the proper place to correct mistakes thus made by a jury, but the matter should have been presented to the court below on a motion for a new trial.

As to the interest—

Held, That as defendant's firm were bound to pay over the proceeds as fast as received, or within a reasonable time thereafter, less their saw bill and other legitimate charges, and failing in this, were properly chargeable with interest, and as it is a fair inference, from all the facts, that such was the intention of the parties, the allowance of interest was not erroneous.

As to the application of payments—

Held, 1. That the presentation of the accounts to the commissioners on claims against Bundy's estate, on the basis of an application of enough of the two notes to extinguish this claim, being accompanied by an express disclaimer of the waiver of any rights against either firm, or the survivor thereof, could not operate as an application of payments binding upon Heart.

Held, 2. That where the parties have made no specific application of moneys paid by one to the other, the law will apply them usually as the justice and equity of the case may require; and that where a *pro rata* application thereof has been made by the court below, it will not be disturbed without a clear showing of superior equities demanding a different application.

Judgment affirmed, with costs.

House of Correction:—Ill-treatment of Prisoners:—Liability of City:—Prisons:—Public Matters:—Officers:—State Management:—Agency:—Custodian.

THE CITY OF DETROIT vs. PATRICK LAUGHNA. Error to Superior Court of Detroit.

D. C. Holbrook, for plaintiff in error.

B. T. Prentis, for defendant in error.

CAMPBELL, J.:

Laughna recovered a judgment against the city for personal injuries, which resulted from his being compelled by the officers of the House of Correction to take a cold bath under improper conditions, and subsequent improper exposure in a cold cell. The city built the prison, and has an interest in the finances, as it is responsible to a certain degree for its expenses. But after its completion the legislature, in 1861, put the government of it under the control of a board of inspectors, three of whom were to be appointed by the council, on the nomination of the mayor, and

the chairman of the board of State prison inspectors and the mayor were made *ex officio* members. The regulation and discipline were to be under rules adopted by the board, leaving the council no voice except concerning the approval of rules relating to salaries and compensation of officers and employés. It selects the superintendent, but it has no authority to interfere either in the selection of inferior officers or in the internal management of the prison.

Held, That there is no principle upon which the liability of the city can be sustained; that all criminal prisons are and must be public and not private places of detention, and no imprisonment therein can be lawful that is not authorized by public laws; that it is impossible under such a statute as that of 1861 to regard the city as custodian of the prison, or as jailer and guardian of the prisoners; that the officers are not city agents, and the city has nothing to do with their responsibility, and there is no relation of agency or service between them.

Judgment reversed, with costs of both courts, and as the declaration shows no cause of action, no new trial is granted.

Contracts:—Declaration:—Quantum Meruit:—Common Counts:—Damages:—Value:—Contract Price:—Quality:—Damages for Breach of Contract:—Default on Both Sides:—Recoupment:—Non-delivery.

JAMES P. CHAPMAN vs. CHARLES DEASE. Error to Saginaw Circuit.

Holmes, Collins & Stoddard, for plaintiff in error.
Thompson & Tarsney, for defendant in error.

GRAVES, J.:

Dease sued Chapman in assumpsit for goods sold and delivered, and also counted upon a contract whereby he was to sell, cut, haul and deliver to defendant a quantity of logs, at $9.50 per thousand feet, and defendant was to make certain specified advances, on which he was to receive ten per cent interest. By these special counts he sought to recover the profits which would have accrued to him had he obtained and delivered the quantity of logs specified in the contract, and which he was disabled from getting, as he claimed, by Chapman's failure to advance as he had agreed. No recovery was had, however, on these special counts, but a recovery was had under the common counts. Each party charged the other with a substantial breach of the contract, and insisted that the charge against himself was sufficiently explained and answered. Both parties fell short of a complete performance of the contract. There were 27,000 feet of the logs that were cut

and scaled, which plaintiff refused, after having run them down, to deliver under the contract.

Held, That as the contract provided that the logs, as fast as cut, should become Chapman's, and as the only excuse plaintiff showed for not performing was defendant's failure to make advances, whereby plaintiff was prevented by lack of means from cutting and getting out all the logs called for by the contract, the non-delivery of the 27,000 feet, which was in fact got out and ready for delivery, was not thereby accounted for or excused in anywise.

The defendant claimed that some of the logs delivered were inferior in quality to the requirements, yet he had received and appropriated them.

Held, 1. That plaintiff could recover no more than the contract price in any event for the logs delivered, and he could only recover that amount in a suit for damages on the contract, after full performance, and being in default himself, he cannot recover beyond the contract price on the common count for value; that in such case the contract price fixes the outside limit, and within that limit the recovery is further limited to the true value of the logs delivered, at the time and place of delivery.

Held, 2. That against this right of recovery the defendant was entitled to allowances for his advances and interest; and that the ascertainment of the true value of the logs would involve the ascertainment of their real quality, and that the plaintiff was not entitled to insist that this question of quality was closed against the defendant by the doings of the scaler provided for by the contract, since the right of recovery was not by virtue of the contract, but outside of it.

Held, 3. That the depreciation in quality being once taken into the account in getting at the true value of the logs on the plaintiff's claim, could not be made again the basis of allowances by way of damages in favor of defendant; that the value upon the common count is fixed apart from the special contract, though the recovery would be limited by the contract price.

Held, 4. That defendant's failure to advance as he agreed, prevents him from recouping damages for the non-delivery of the logs which were not delivered.

Judgment reversed, with costs, and a new trial ordered.

Execution Sales:—Growing Crops:—Place of Sale:—Presence of Property:—Officer's Return:—Parol Evidence:—Fraudulent Transfers:—Consideration:—Evidence.

ELIZABETH WINFIELD vs. WILLIAM D. ADAMS. Error to Calhoun Circuit.

T. G. Pray, for plaintiff in error.

W. D. Adams, in person, for defendant in error.

COOLEY, Ch. J.:

This is a controversy over some corn, to which each party claims title under one White; Adams by purchase at a sale on execution, and Winfield by an earlier purchase of the lease of the premises on which the corn had been raised. Adams was plaintiff in the court below. His evidence tended to show that the corn was levied on as a growing crop, August 22, 1873, and was in three fields, on two different sections, and considerable distance apart. The sale was made October 11, 1873, on the platform of a railroad station house in sight of two of the fields, one of which was about thirty or forty rods distant, and the other eighty or one hundred rods. The third field was from half to three-quarters of a mile away, and not in sight from the place of sale. It was the interest of White in the crop, as it stood unharvested in these fields, that was sold.

Held, That under our statute requiring personalty sold on execution to be present and within the view of those attending the sale, the sale of the parcel farthest off could not be supported, and it is doubtful whether the others would come within the rule, though the evidence affecting this point as to them is conflicting.

It was insisted for the plaintiff below, that the sale could not be be defeated by parol evidence contradicting the officer's return, and showing that his proceedings were not in compliance with the statute.

Held, That this point is ruled by *Nall vs. Granger*, 8 Mich., 450; that one who claims by a title originating prior to the officer's levy is not prejudiced by his return from showing the real facts.

Winfield gave evidence tending to show that she took an assignment from White of his lease, to secure her for an indebtedness from him, in part for money loaned him, many years before, and in part for wages she had earned in his service. Adams attacked the assignment, as being fraudulent as against creditors, and Winfield offered to show that the money loaned to White was money which was hers before she went into his service. This was objected to and ruled out.

Held, That this was error; that, as bearing on the question of fraud, it was a very important circumstance if the woman had

money of her own at a time when there could be no suspicion of a purpose on the part of the debtor to make use of her as a cover for his property; that a loan by a servant to the employer is likely to be more or less suspicious, and whatever would fairly tend to show whether it was real or simulated, ought to be received.

Judgment reversed, with costs, and a new trial granted.

Estates of Deceased Persons:—Descent of Property:—Widow: Mother:—Unmarried Minors:—Inherited Estate:—Statute Construed.

ANN BURKE vs. JOHN D. BURKE et al. Error to St. Clair Circuit.

Miles & Coe, for plaintiff in error.
H. W. Stevens, for defendants in error.

MARSTON, J.:

This case was commenced to determine who were the heirs-at-law of Thomas Burke, Jr., deceased. The facts as found were, that Thomas Burke, Jr., died while yet a minor, unmarried and intestate; that his father, Thomas Burke, Sr., died intestate, some two or three years before he did, leaving him surviving, his widow, the said Ann Burke, the said Thomas Burke, Jr., now deceased, and two other sons, John D. and George W., who were brothers of the half blood of the said Thomas Burke, Jr.; that all the estate of said Thomas Burke, Jr., including the land mentioned in the petition, came to him by descent from his said father; that prior to the death of said Thomas Burke, Jr., the estate of his father had been fully administered, closed and settled, and the land in question had been set off to said Thomas Burke, Jr., as a portion (or all) of his share of the estate, and the widow of Thomas Burke, Sr., mother of Thomas Burke, Jr., now claims, under sec. 4309, sub. 3, that she is entitled to share equally with his two brothers in his estate. The court below ruled that sub. 6 of sec. 4309 governed the case, and that the mother was not entitled to any share in the estate. The third subdivision of the section reads as follows: "*Third*, If he shall leave no issue, nor widow, nor father, his estate shall descend in equal shares to his brothers and sisters, and to the children of any deceased brother or sister by right of representation: *Provided*, That if he shall leave a mother, also, she shall take an equal share with his brothers and sisters." And the sixth, as follows: "*Sixth*, If any person shall die leaving several children, or leaving one child, and the issue of one or more other children, and any such surviving child shall die under age, and not having been married, all the estate that came to the

deceased child by inheritance from such deceased parent, shall descend in equal shares to the other children of the same parent, and to the issue of such other children who shall have died, by right of representation."

Held, That the third subdivision, if standing alone, would clearly apply to and govern the case; but that the statute must be read and construed together as a whole, and the different provisions harmonized, if possible, so as to give effect to them all; that the first five subdivisions of the section seem to have reference to and provide for the descent of the real estate of intestates generally, without any reference to the manner in which, or source from whence, the intestate acquired or derived his title, and the sixth and seventh subdivisions go back to the source from whence the deceased minor intestate derived his title, and provide how, in certain cases, a minor's inherited estate shall descend; that the intent of the statute is, that where, upon the descent of an estate to children, one of them shall happen to die in infancy, before arriving at the age when by law he has the power of disposing of his estate, and before he has by marriage contracted obligations and established new relations to others, his share of the inheritance shall go just in the same way as if such child had died in the lifetime of the ancestor, or to those who would have taken it if such child had not existed; and that this proviso applies only to estates inherited from the parent, and not to estates acquired in any other way, or from any other source; and that the ruling of the circuit judge was therefore correct.

Judgment affirmed, with costs.

Mortgages: — Priority: — Simultaneous Mortgages: — Foreclosure by Advertisement: — Date of Acknowledgement: — Registry: — Notice: — Equity Jurisprudence : — Marshalling Assets: — Pleading and Practice.

BENJAMIN VANAKEN vs. JOHN T. GLEASON, et al. Appeal in Chancery from Saginaw Circuit.

John J. Wheeler, for complainant.
Gaylord & Hanchett, for defendants.

CAMPBELL, J.:

This bill was filed to determine and protect the rights of complainant under a mortgage dated April 7, 1868, made by defendant Emery and one Hart, to defendant Gleason, on lot 8 and the east half of lots 2 and 3, in block 8, in the village of Chesaning, being property occupied as a hotel. Before April 7, 1868, Gleason was in possession of this and adjoining property. He held a contract from Grasley for the purchase of lots 3, 6, 7 and 8, for

$3,500, of which all was paid but $1,750, and interest, and this was to become due, one-half the next August, and the balanee in August, 1869. Nothing was in arrears. On April 7, 1868, Hart and Emery purchased of Gleason lot 8 and the east half of lots 2 and 3, and it is assumed, though the deeds do not appear in the record, that eonveyances were made to them. Gleason advaneed to Grasley the payment whieh would beeome due the next August, and two mortgages were then given by Hart and Emery for the unpaid purehase money, one to Grasley, for the installment to fall due August, 1869, being $875, and one to Gleason for $800, payable, $500 and interest April 1, 1870, and $300 and interest April 1, 1871. The Grasley mortgage was foreelosed by advertisement, in Deeember, 1869, and the property bid off by Grasley's agent, one Goodell. Just before the redemption ran out, Gleason procured one Kenyon to redeem, and title was made to Kenyon by Goodell immediately after the redemption expired, but in pursuanee of an agreement made before. A few months thereafter Gleason proeured one Hieks to advance to Kenyon the amount of his purehase, and a bonus of $50 for his trouble, less $300, whieh was allowed by Kenyon as previously due from him to Gleason. Thereupon Kenyon conveyed to Hicks, who gave Gleason a lease for five years, at $300 a year, of lot 7 and the east half of 2 and 3. This lease does not include lot 8, and does not aeeount for the $300 advaneed towards the purehase money. Mr. Hieks was not sworn as a witness. Gleason claims this $300 was to apply as the first year's rent. In March, 1869, Gleason and Emery were keeping the hotel, and complainant held a chattel mortgage on the furniture and personal property. To prevent the foreclosure of this mortgage, Gleason induced complainant to take the real estate mortgage given him by Hart and Emery, which, as appears from the proofs, was represented to eomplainant as a first and only mortgage. Complainant, after final default, foreelosed this, and bid it in on the foreelosure, before he obtained any knowledge of the Grasley mortgage. The Gleason and Grasley mortgages both bear the same date. The Grasley mortgage was first acknowledged, and the other first recorded.

Held, 1. That as eomplainant, when he purehased the Gleason mortgage, had construetive notiee by the recording of the Grasley mortgage, of which Gleason was aetually informed, such notice as the record gave him was binding.

Held, 2. That as both the mortgages bore the same date, and Gleason's was first reeorded, it can hardly be claimed the earlier acknowledgment of the Grasley mortgage would neeessarily show it was intended or given as a first seeurity; and that the proofs indieate that there was no agreement coneerning a preference, but that it was intended both should stand on the same basis.

Held, 3. That if the mortgages were designed to be and were made in law simultaneous, then it is manifest that foreclosure by

advertisement would not be effectual to settle the relative rights of complainant and the purchasers under the Grasley foreclosure, and a bill in equity is necessary to determine them, and to marshal the assets; and that to do this a sale is necessary, unless one of the parties shall take up the other's mortgage.

Held, 4. That although the bill is framed on the theory of priority, yet it contains enough to authorize the proper relief under the general prayer.

Decree below reversed, with costs against Gleason and Hicks, and a decree directed for a foreclosure and sale, and a ratable application of the money on the two mortgages, if not sufficient to pay both, the cause to be remanded to have such decree entered at the circuit.

County Treasurers:—Official Bond:—Delinquent Taxes:—Returns to Auditor General:—Time:—Default:—Township Treasurer's Returns:—Requisite Preliminaries:—Extensions:—Evidence:—Presumptions:—Official Duty.

THE BOARD OF SUPERVISORS OF HOUGHTON COUNTY vs. SETH REES et al. Error to Houghton Circuit.

C. I. Walker, for plaintiffs in error.

Hubbell & Chadbourne and *S. F. Seager*, for defendants in error.

GRAVES, J.:

This was an action upon the official bond of the defendant Rees, as county treasurer of Houghton county, and the plaintiffs claimed that Rees refused to account for and pay over money he had received for the county, and also, that he had neglected to return lists to the auditor general of lands delinquent for taxes for 1870 and 1871. The cause was tried by jury, and a verdict rendered for the defendants. As the evidence as to the first charge of plaintiffs' claim was all let in and the question fairly submitted to the jury, no question is raised concerning it. But the court refused to submit the facts concerning the other charges, and based his refusal upon the indefiniteness and insufficiency of the declaration. The defendants now further insist that there was a fatal gap in plaintiffs' evidence.

Held, That if the point as to the insufficiency of the evidence is well taken, then the ruling of the circuit court was not error, though he based it upon another ground, for the ruling would not be prejudicial.

The theory of the plaintiffs is, that it was Rees' official duty, on receiving, in due form and season, lists of delinquent tax lands from the township treasurers, to forward transcripts thereof in due

form and lawful season to the auditor general; that the township treasurers did seasonably and in proper form report to him such lists, but that he neglected to forward transcripts thereof, and thereby became liable to the county for an amount equal to the taxes charged on such lands, less, however, the amount appearing to have been paid. The evidence introduced tended to show that the several township treasurers returned delinquent taxes upon lands to a large amount, on account of assessments for the years 1870 and 1871. Certificates of the deputy auditor-general were then introduced, certifying that he had made diligent search for the transcripts made by the treasurer of said county of descriptions of lands returned to the auditor-general's office as delinquent for unpaid taxes for said years, and was unable to find any as made by said treasurer and received at the auditor-general's office prior to April 1, 1871, for the taxes of 1870; and the same as to taxes of 1871. No other evidence was given of Rees' failure to forward transcripts, or of their non-reception; and no evidence was given to show at what time or times the township treasurers made their reports to the county treasurer.

Held, *1*. That as under the statute the reports of the township treasurers is necessary to enable the county treasurer to forward these transcripts, he cannot be held to have been in default for not forwarding the transcripts until a reasonable time after the reports have been made to him; and that while the statute provides for his forwarding the transcripts by the first day of March next after the return of the township treasurer's statement, and declares it to be receivable at the auditor-general's office at any time during the month of March, it also provides for an extension of the time for collecting the taxes, viz.: by the board of supervisors till March 31st, and by the town board till March 1st; and that consequently the evidence did not absolutely show that the default in not having the transcripts received at the auditor-general's office prior to April 1st of the said years was the county treasurer's rather than the township treasurers', or, in fact, that there had certainly been any default on the part of any one, since if there had been an extension by the board to the full time permitted by the statute, the transcripts would not in regular course be required to be received at the auditor-general's office before April 1st.

Held, *2*. That this omission of express evidence cannot be supplied by presumption that the township treasurers' returns were made in due season in accordance with their official duty; that as the law made their action a necessary preliminary to that of Rees, it will not allow due performance on their part to be proved by naked presumption, in order to charge him with neglect of his duty.

Judgment affirmed, with costs.

Justice's Courts:—Return Day:—Waiting One Hour for Defendant to Appear:—Jurisdiction:—Collateral Attack:—Execution Sales:—Sheriff's Deed:—Description:—Fraudulent Transfers:—Husband and Wife:—Proofs.

THADDEUS G. SMITH vs. HENRY BROWN et al. Appeal in Chancery from Genesee Circuit.

T. G. Smith, in person, for complainant.
Foster & Beebe, for defendants.

GRAVES, J.:

The defendants are husband and wife, and in 1870 were living apart, he residing at Decatur, and she at Fenton, in this State. He then owned five lots and a house in Fenton, which she, with three daughters, occupied as a dwelling. In August of that year a decree of divorce was granted in the Van Buren Circuit, in a suit instituted in her name. No allowance seems to have been made in her favor, but about the time of the decree he gave her his personal undertaking in writing for $1,000. In 1872 she employed the complainant to procure the setting aside of the decree of divorce and the dismissal of the bill, which he did. A few days afterwards she filed a bill for divorce from bed and board in the Genesee Circuit, complainant acting as her solicitor. The subpœna was personally served October 1, 1872. Mrs. Brown was with her husband when this service was made. Brown drew up a deed of these lots in Fenton and executed it in the presence of a justice of the peace and caused it to be attested by the justice and another witness, and handed it to Mrs. Brown. It was not acknowledged, however, but was in all other respects complete. On her return to Fenton she instructed complainant to stop the divorce case and gave as a reason that her husband had deeded these lots to her. Two months afterward, Brown filed an answer to the divorce bill, but no further proceedings were taken in that suit. About a week after the filing of this answer, complainant sued Mrs. Brown before a justice of the peace for his services in these matters, obtaining personal service. She failed to appear and he obtained judgment for $125 and costs. No attempt was made to disturb this judgment and no execution was issued by the justice. About ten days after this judgment, Mrs. Brown received from her husband, by mail, a warranty deed from her to him of the lots, which she executed and returned to him. Shortly afterwards complainant procured a transcript of his judgment to be filed in the circuit, caused execution to be issued and levy made on four of these lots, and in due time they were sold on the execution and bid in by complainant, and afterwards deeded to him by the sheriff for want of redemption. He then obtained posses-

sion by summary proceeding, and Brown brought ejectment against him. Complainant thereupon filed this bill alleging that Mrs. Brown obtained title by the first deed, and that the second transaction was fraudulent, as against him. The bill was taken as confessed as to Mrs. Brown, but her husband answered and proofs were taken. The court below granted relief and Brown appealed.

He makes three objections to the decree: 1. That the judgment against Mrs. Brown is void; 2. That the sheriff's deed relied upon does not describe the premises referred to in the bill; and 3. That there was no fraud meditated or committed against complainant or any other creditor.

The ground of the first objection is, that the transcript does not show that the justice waited an hour for the defendant to appear.

Held, That the statute does not specify that the justice in cases of personal service shall wait at all for the defendant after the arrival of the hour for appearance; that the New York decisions on this subject are not in point, for there the statute requires the justice to wait an hour after the time specified for the return, unless the parties shall appear sooner; that granting, but not deciding, that regularly the justice ought to wait an hour for the defendant to appear, yet his omission so to do could at most amount to error, and would not be a fault affecting jurisdiction, and hence not one subject to be taken advantage of collaterally.

The second objection is based on the fact that the sheriff's deed contains no express words stating that the lots were in the county of Genesee and State of Michigan.

Held, That there is no force in this objection; that the description is not ambiguous on its face, but purports to denote the parcels in dispute, and the parties by their proceedings have conceded that it applies to them.

As to the last objection—

Held, That looking at the shifts which were made between these parties, and the indications afforded by the open facts, the inference was strong that there was a design to screen these lots from complainant's claim; that if the transaction was a fair and honest one, it was in defendants' power to afford explanations, by answer and evidence, not only harmonious but convincing on the question of good faith, but that self-contradiction, vague and partial explanations from witnesses not likely to be well informed, failure to call others presumably acquainted with controlling circumstances, destruction of letters connected with the controversy, and inability, real or feigned, to reveal their contents, are incidents inconsistent with a claim of good faith, and the defense made here involves all these; and that the objection in question is not supported by the proofs, and cannot prevail.

Decree affirmed, with costs.

Criminal Law:—Murder:—Manslaughter:—Provocation:—Malice:—Unlawful Notice:—Deliberation:—Degrees of Murder:—First Assailant:—Companions:—Question of Fact:—Responsibility for another's Assault:—Charge to the Jury.

EMORY NYE vs. THE PEOPLE. Error to Calhoun Circuit.

T. G. Pray, for plaintiff in error.

A. J. Smith, Attorney General, for the People.

CAMPBELL, J.:

Nye was charged with the murder of Robert Molyneaux, and was convicted of murder in the first degree. The objections urged to the judgment relate to the quality of the offense as murder or manslaughter. The homicide occurred in a sudden affray. Nye and his co-defendant Betts were playing cards with an elderly man named Chambers, when Molyneaux interfered in a somewhat offensive way, on a claim, according to some of the testimony, that they were imposing on or likely to ill treat the old man. There was nothing to indicate that they were doing so, or that Molyneaux had any good reason to think so. His interference provoked Nye and Betts, and after some harsh language, Molyneaux and Betts proceed to take off their coats for a scuffle. Betts struck at Molyneaux, who was a powerful man, and who knocked him a considerable distance; he also knocked Nye down in the same way, Nye having, according to most of the witnesses, struck at him first. Nye then stabbed him with a knife which he had in his pocket, and which was apparently one calculated to be used as a weapon. The court among other things told the jury that if Nye and Betts, or if Betts alone, began the attack, the offense would be murder; and in defining malice said it included "anger, hatred, revenge, and every other unlawful and unjustifiable motive." He also instructed the jury that while murder in the first degree in ordinary cases required a wilful, deliberate, premeditated design to take life, that design might be formed an instant before the act.

Held, 1. That upon the facts it was legally competent for the jury to have found a verdict of manslaughter or of murder in the second degree, according to their views of the provocation and its effects, and according to the view they took of some inconsistent testimony.

Held, 2 That it was error to hold that Nye must be found guilty of murder if Betts began the assault; that whatever may be the rule where the accused is himself the assailant, it cannot certainly be claimed that a man who makes no assault until he is struck first himself must necessarily be responsible for the misdoings of his companions, and that it was not within the province

of the court to decide as a matter of fact that Nye was a party to any assault made by Betts, if he made none himself.

Held, 3. That the definition of malice given by the court below would remove manslaughter from the catalogue of homicides, as every crime must be attended with an unlawful and unjustifiable motive; that malice does not include every unlawful and unjustifiable motive, but only those which are more wicked; that manslaughter may in some cases be intentional, and in such case it differs from murder in the provocation; that it is not justifiable to take life under provocation, and yet the provocation may be serious enough to deprive the intentional killing of its malicious character, so that it is neither murder on the one hand, nor justifiable or excusable on the other.

Held, 4. That the instruction concerning the degrees of murder was also erroneous; that in dividing murder into degrees, its common-law qualities are not changed, but (except in special cases) the division is chiefly between cases where the malice aforethought is deliberate and where it is not; but that it is a perversion of terms to apply the term deliberate to any act which is done on a sudden impulse.

Held, 5. That there is no testimony whatever in this record upon which a verdict of murder in the first degree could properly have been rendered, and the charge given must have misled the jury; that alternative should not have been left open to them.

Judgment reversed, and a new trial granted.

Trover:—Hogs:—Conversion:—Ownership:—Title:—Executory Buyer:—Transfer of Title.

JOHN MCDONOUGH vs. BENJAMIN F. SUTTON et al. Error to Hillsdale Circuit.

C. A. Stacy, for plaintiff in error.

E. L. & M. B. Koon, for defendants in error.

GRAVES, J.:

McDonough sued defendants in error in trover for the alleged conversion of 125 hogs, and failing to recover, he brought error. He complains of the instructions to the jury.

Held, That if it appears from the case made by his proofs that he was not entitled to recover under any instructions which the evidence would warrant, it is immaterial whether the rulings of the circuit judge were correct or not, for if erroneous, they could have worked no prejudice.

The vital question relates to McDonough's ownership of the hogs. He claims that Sutton, dealing with him through his father, sold and conveyed the hogs to him about Sept. 3, 1868, and then turned around and sold and delivered them to defendant

Boyle, and that thereupon Sutton and Boyle denied his right and disposed of the animals. Defendants insist that the negotiations between Sutton and McDonough, relied upon by the plaintiff, fell through by McDonough's default and never resulted in a transfer of title. The clear import of plaintiff's evidence was, that several farmers had bargained their hogs to Sutton at an agreed price, to be paid on delivery, allowing for small payments made down; that they were to drive the hogs in to Allen, a railroad shipping point in Hillsdale county, on Sept. 11, 1868, where the hogs were to be weighed, and paid for and delivered, and become the property of Sutton; that on Sept. 3, 1868, Sutton contracted to sell the whole quantity to plaintiff at 7½ cents a pound, $150 being paid down and the balance provided to be paid on Sept. 11th; that the farmers drove in their hogs and were ready to deliver them, but plaintiff's money, which was to come by express, having failed to arrive, he did not make the payment and Sutton therefore could not pay the farmers; that it was then arranged that matters should stand over another day, plaintiff paying the keeping and agreeing to forfeit the $150 paid down if the trade was not completed next day; that early next morning Sutton sold to Boyle, who paid in full, and they together drove off the hogs; that plaintiff's agent overtook them, tendered the balance of his contract price and demanded the animals, and defendants refused. He then brought suit.

Held, That it is apparent Sutton never had title to the hogs, but was a mere executory buyer and was so understood, and that the whole transaction had reference to the retention of title by the farmers till they were paid, and the title therefore never reached the plaintiff, and that he therefore could not maintain trover; that whatever plaintiff's rights may have been, they were not enforcible by any remedy based on his ownership of the hogs.

Judgment affirmed, with costs.

Attachment: — Growing Crops: — Possession: — Affidavit: — As near as may be:—Appraisers:— Disinterested Freeholders: Collateral Attack:— Presumptions:— Levy: — Endorsement:— Damages:— Judgment:— Amount of Lien:— Charge to the Jury: — Rulings that do not Prejudice.

LEONARD GROVER et al. vs. WILLIAM L. BUCK. Error to Calhoun Circuit.

Brown & Patterson, for plaintiffs in error.

T. G. Pray, for defendant in error.

COOLEY, Ch. J.:

Buck sued plaintiffs in error and recovered for their having taken away and harvested certain wheat which he as sheriff had

attached as a growing crop, by virtue of a writ against Powell Grover and others. The attachment is claimed to have been invalid because the affidavit did not comply with the statute in stating the amount of the indebtedness "as near as may be" over and above all legal set-offs.

Held, That the affidavit stating an indebtedness in a sum specified "over and above all legal set-offs," it is a positive assertion that a sum certain is due, and that when that can be stated, the qualifying words "as near as may be" are wholly unnecessary, and that the affiant states the sum as near as may be when he states it exactly.

It is further objected that the appraisers were sons of Powell Grover and consequently not disinterested, and also that they were not freeholders and were not sworn, though the statute requires the appraisal to be by disinterested freeholders and under oath.

Held, That the statutory provision has the interest of the defendant in the attachment particularly in view, and requires disinterested freeholders for his protection; that if members of his family are called upon to act it cannot be presumed they have an interest adverse to his; and that where the proceedings are attacked collaterally there ought to be some showing that the defendant, if personally served and present, had objected to the want of qualification in the appraisers, or was ignorant of the facts.

An objection is made that no levy was endorsed on the attachment.

Held, That as the sheriff's return upon the writ recited a levy and was accompanied by the appraisal, that was sufficient.

The sheriff was allowed to prove the judgment in the attachment, though rendered after the alleged conversion.

Held, That this was proper and the only way in which the amount for which the sheriff had a lien on the property could be determined.

It is claimed the attachment was invalid because the officer failed to take possession, the statute providing therefor unless the defendant or other person in whose possession it may have been found, shall give bond, etc.

Held, That all the possession the statute can intend must be such as the nature of the property renders it susceptible of, which in case of a growing crop could be constructive possession only.

An instruction to the jury which contained a statement that a wife cannot be tenant of her husband is complained of.

Held, That this must be considered in connection with the facts in evidence and the rest of the charge, viz: that an arrangement whereby Powell Grover had verbally agreed with his wife, in consideration of her paying certain debts, to give up his rights in a written contract whereby he reserved to himself, from a deed of

the premises to his wife, the right of possession and the right to repurchase within five years, was within the statute of frauds and void; and that as the judge was correct in holding the arrangement invalid because not evidenced by writing, the addition of the merely incidental remark that "if it amounted to anything it would make the wife tenant of the husband, which was impossible," was immaterial and could not have prejudiced the case.

Judgment affirmed, with costs.

Booming Companies:—Purprestures:—State Interest:—Attorney-General:—Equity Pleading and Practice:—Informations:—Bills:—Individual Grievances:—Navigable Waters:—Floatage:—Public Right:—Private Appropriation:—Nuisances.

THE ATTORNEY-GENERAL on the information of THE MUSKEGON BOOMING COMPANY vs. THE EVART BOOMING COMPANY. Appeal in Chancery from Osceola Circuit.

A. J. Smith, attorney-general, and *Hughes, O'Brien & Smiley*, for informant and complainant.

William L. Webber, for defendant.

COOLEY, Ch. J.:

This suit was brought to have the defendant restrained from "obstructing the navigation of the Muskegon River by its booms near the village of Evart, and from hindering, delaying, stopping or interfering with the floating, running, rafting or driving of logs in said river, and from detaining the logs being run, rafted, floated or driven by the Muskegon Booming Company, and from in any way hindering, by their booms or otherwise, the free navigation of said river;" and for an accounting by respondent with relator for damages already sustained, and for general relief. The case comes up on demurrer.

Held, 1. That the pleading filed to institute this suit is anomalous, and reads as if it were originally prepared as a bill on behalf of the Muskegon company, and afterwards, by slight alterations, converted into an information, the words "your orator" being so employed that it is not always clear whether they refer to the informant or to the relator; but that all matters of mere form may be overlooked if the substance of a legal complaint appears.

Held, 2. That an information at the instance of the attorney-general must necessarily be based upon a public ground.

It is insisted that a public grievance is shown; that the acts complained of constitute a public nuisance and a purpresture.

Held, That a purpresture may be defined as an enclosure by a private party of a part of that which belongs to and ought to be open and free to the enjoyment of the public at large; that a purpresture, however, is not necessarily a public nuisance if it do not subject the public at large to some degree of inconvenience or annoyance; that the appropriation of a part of that which belongs to the public may sometimes not be unlawful, as where it is essential to the proper enjoyment of the public right, like the extension of a wharf into navigable waters.

Assuming that the pleading makes out a plain case of appropriation by respondent of a part of the bed of the Muskegon River to their own purposes, the questions raised then are: (1) Whether the appropriation is of something which is common to the public; and if so, then (2) whether it is made in a manner or under circumstances which justify or excuse it.

Held, 1. That navigable waters at the common law are those where the tide ebbs and flows, and under these the public have a proprietorship in the soil itself; but the Muskegon River is not of this character, and the public have no rights in the soil under it, neither is it at the place in question a navigable stream in the more popular sense of that term, but its value to the public consists in the use of it for floating logs or lumber; that while the right of floatage is one which the State should guard and protect, the private appropriation of a part of the bed of the stream would not necessarily be a purpresture or a nuisance; that there is a manifest distinction in this respect between the highway by land, with its definite limits to which the public right extends whether the whole be used or not, and the highway for floatage in small streams, where the public rights have no definite limitations of space, except as practicability for use and the occasions for use may give variable limits, as the seasons and the needs of business and traffic may change.

Held, 2. That even if the appropriation of a part of such a stream were before presumptively a public injury, the public must be deemed to have waived its right to complain so far as the appropriation be not unreasonable, when the law permitting the organization of booming companies and regulating their operations was enacted; for some appropriation is essential to their operations; and that nothing can be a nuisance which the sovereign authority allows, especially when the allowances are on public grounds and made to facilitate the use of that which is common to all; that the question of the lawfulness of a booming company's appropriation of part of a stream to its purposes, depends upon whether the general public desiring to avail themselves of the navigable right, are more inconvenienced than accommodated thereby.

Held, 3. That while the information makes out a case of inconvenience and injury to the relator, it does not follow that a pub-

lic nuisance is shown; that two booming companies using the same stream must of necessity subject each other to some annoyance and delays, and abridge somewhat each other's receipts, but that these inconveniences, so far as they are not reasonably to be avoided, must be put up with, and are not the subject of either public or private complaint, any injury suffered under such management being incidental to and inseparable from the exercise of a general right.

Held, 4. That if the respondent fails to keep within the limits of a just exercise of its rights, the case may still be one of purely individual injury, and that the complaint here made is really of a private injury to the relator, of carelessness or recklessness in the exercise of a public and general right to its prejudice; that the State at large has no interest in an individual grievance of this nature, and that no case is made out here for the intervention of the State authorities.

It is urged that the pleading is both an information and a bill, and that though it be required to be dismissed as an information, it may still be sustained in the other character.

Held, That the pleading, though informal, is essentially an information, and that there can be no bill of complaint without a complainant; and the fact that the attorney-general, appearing as the sole party addressing the court, fails to make out a case on behalf of the public, cannot entitle him to bring the relator forward as orator at the hearing; but when the information is dismissed, there is nothing to support a decree in favor of any one.

Decree below, dismissing the information, is affirmed, with costs against the relator.

Highways:—Private Ways:—Curative Statute:—Construction:—Public Roads:—Declarations:—Special Damages:—Injuries:—Charge to the Jury:—Negligence:—Voluntary Action.

MORRIS GREEN vs. HENRY BELITZ. Error to Oakland Circuit.

A. C. Baldwin, for plaintiff in error.

C. & W. N. Draper for defendant in error.

MARSTON, J.:

Belitz brought an action of trespass on the case to recover special damages sustained by him on account of an alleged obstruction of a public highway by defendant. Plaintiff's evidence tended to show that the road in question had been used as a highway for more than twenty years: that it was four rods wide up to 1863, when defendant fenced it in, leaving it less than twenty-six feet wide; that in 1866, and again in 1869, defendant drew and deposited stone in the road, which caused snow to accumulate in drifts upon

the road; that plaintiff had, without fault on his part, broken his wagon and sleighs upon these stones, and was otherwise injured on account of the snow drifts, as he had no means of ingress or egress to his farm except by this road; that a survey had been made and recorded of this road, and that highway labor had been performed thereon in 1871 and 1872, and that plaintiff had worked out his road tax upon it under defendant's directions as overseer of highways. Defendant's evidence tended to show that the road was not a public highway, but a private way, used under an agreement made with a former proprietor of the land owned by plaintiff; that no public road had ever been laid out here, nor had the land ever been dedicated or condemned for a highway. The court charged, at plaintiff's request, that if the jury should find the way was, on March 15, 1861, a road not recorded, and that the same had been used for a period of ten years or more, then the same, by force of the statute (Compiled Laws, sec. 1268), became and was a public highway.

Held, 1. That the force and effect of this instruction was, that a mere private way used as such for a period of ten years became by force of the statute a public highway; and that the statute will not bear such a construction; that it was never intended to convert private ways into public roads by any so summary process; that it applies to public highways only, and was designed to cure defects in the laying out and recording of the same where they had been used as public highways for ten years

Held, 2. That the plaintiff's declaration sets forth a good cause of action, and that the evidence introduced by him to show the special damages was admissible in case the highway was a public one.

Held, 3. That if the plaintiff did voluntarily run against the stones and break his wagon, that would not prevent his right to recover any other legitimate damages which he sustained on account of the obstructions, and the refusal of a request to charge, which stated the consequences so broadly, was therefore not error.

Judgment reversed, with costs, and new trial granted.

Railroads:—Injury to Animals:—Negligence;—Presumptions:—Usual Precautions:—Cattle Guards:—Evidence:—Charge to the Jury:—Testimony of Single Witness.

THE GRAND RAPIDS & INDIANA R. R. CO. vs. ROBERT F. JUDSON. Error to Kalamazoo Circuit.

Hughes, O'Brien and Smiley, for plaintiff in error.

Severens, Boudeman & Turner, for defendant in crorr.

CAMPBELL, J.:

Suit was brought to recover damages for injuries to a mare and colt in the village of Kalamazoo. One count claimed the injury

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to have arisen from neglect to keep up proper cattle guards. The other charged negligence in running trains. The testimony showed that the train was run in the usual way, and with the usual precautions.

Held, That as negligence cannot be presumed, but must be affirmatively proved, and as it cannot be presumptively negligent to run in the usual manner, without proof that such usual manner is itself improper (which can rarely happen), the defendant below was entitled to a charge that this cause of action was not made out.

Upon the question of the cattle guard there was some testimony, not objected to and not stricken out, which had some tendency to show the cattle guard insufficient.

Held, That inasmuch as all the testimony of persons acquainted with the construction of cattle guards sustained its sufficiency, and as the evidence was very conclusive that the mare was caught in it in a way which showed it was very different from which some witnesses represented it, there is reason to believe a more complete cross-examination would have been desirable, but that this testimony not being shown to have been based on guess-work instead of knowledge, whatever its weight or quality, it cannot be said not to be properly open to the jury.

Held, further, That it is not error to refuse to put the case to the jury upon the testimony of a single witness, or to decline to instruct them that if they believe such witness their finding should be for a particular party, though it may not be error to give such instruction.

Judgment reversed, with costs, and a new trial granted.

Contracts for Sale of Lands:—Statute of Frauds:—Agency:—Authority in Writing:—Rescissions:—Part Performance:—Payment of Money:—Discharge of Mortgage:—Preparatory Steps:—Reservation of Possession:—Crops:—Further Reservation.

SARAH A. COLGROVE v. JOHN J. SOLOMAN. Error to Van Buren Circuit.

O. T. Tuthill, for plaintiff in error.

Severens, Boudeman & Turner, for defendant in error.

GRAVES, J.:

Mrs. Colgrove sued for money had and received, to recover a sum she had paid Soloman as purchase money on a land trade which had been rescinded, but failed to recover. The defense was grounded upon a subsequent agreement and performance, whereby

she was paid partly in money and partly in land. She agreed to buy eighty acres of land of Soloman for $2,500, which he deeded to her. She gave back certain securities and $1,500 in money. The title not being satisfactory, by mutual consent the trade was canceled, and she reconveyed, but he did not restore the money. An oral arrangement was entered into whereby Soloman was to pay Mrs. Colgrove $400, and procure a conveyance of a piece of land owned by one Alanson, on which were two mortgages, one belonging to Soloman, and the other for $500 owned by a third party. Soloman desired possession of the land to be detained till October following. The property was valued at $1,600, subject to such detention, or $1,100 subject both to that and the $500 mortgage. The arrangement was that it was to be deeded subject to both these burdens. Soloman paid the $400, discharged his mortgage, and forwarded to Dr. Harrison, who had acted in the matter as a mutual adviser and friend, a deed executed by the Alansons. The deed was attested by but one witness, and contained, in addition to the reservation of possession as agreed upon, a further reservation of all crops grown before October. Harrison objected to the deed for some trifling inaccuracies, and also for the defective attestation, but not for the reservation of the crops. He returned the deed, and advised the making of a new one. Mrs. Colgrove, in the meantine, decided not to accept the land, and so wrote to Dr. Harrison. A second deed was, however, made out and executed by the Alansons and sent to Harrison, containing a similar reservation of crops. Harrison sent it to Mrs. Colgrove, and she refused to accept it, and handed it to her attorney.

Held, 1. That as the bargain was an oral one it was not binding, and that the acts and doings of Dr. Harrison in the matter, he having no written authority or power, could have no force to convert plaintiff's verbal and invalid bargain into one valid and obligatory; that if in any proper sense he was her representative to make or validate any contract, he was no more able without writing than she was in person to bring her into binding contract relations as vendee.

Held, 2. That as here had been no valid contract binding Mrs. Colgrove to receive the land, there was no occasion or necessity for any action looking to a rescission of anything.

Held, 3. That the payment of the $400, being only payment of so much of an existing debt or obligation, could have no weight as part performance to take the oral bargain out of the statute of frauds.

Held, 4. That defendant's discharge of his mortgage on the Alanson land was not a fact of part performance at all, as it constituted no element of the oral bargain, but was only an act preparatory to steps in the execution of such bargain; but, moreover, that if done in part performance, it would only be equivalent to paying

so much money, and so could not avail to prevent the application of the statute.

Held, 5. That the insertion in the deed of the reservation of the corps, in addition to the reservation provided for by the bargain, being a material departure to her prejudice from the terms of the bargain, relieved her from all obligation to accept either deed; and that the reservation of the crops is not included in an agreement to reserve the possession merely.

Judgment reversed, with costs, and new trial granted.

Attachment:—Service:—Certificate:—Copy:—Inventory:—Formal Defects:—Default:—Want of Plea:—Affidavit:—Judicial Notice:—Judgment.

JOHN LEONARD v. HENRY WOODWARD, et al. Error to Benzie Circuit.

E. S. Pratt, for plaintiff in error.

W. H. Francis and *Fowler & Harley,* for defendants in error.

COOLEY, Ch. J.:

The writ of error in this case brings up a judgment rendered on default in a suit by attachment. It is objected that the copy of the writ which was served on the defendant was not certified by the officer. The sheriff returned that he served a copy of the writ, and this fact is not disputed. He also returned that at the same time he served a copy of the inventory of the property, duly certified.

Held, That the omission of the formal certificate on the copy served could not have misled the defendant under the circumstances, the copy inventory being duly certified, and that he could not have supposed the service to be other than a service of authentic papers; that such a purely formal defect ought not in such case to defeat the jurisdiction.

It is also objected that default for want of a plea was entered without the filing of any affidavit showing an actual default.

Held, 1. That such affidavit, if filed, would not become a part of the record, and therefore it does not appear in this case that one was not filed.

Held, 2. That in a case like this such affidavit if filed could only inform the court of that which it must take judicial notice of, namely, that no plea had been put upon the files, and that if the court took judicial cognizance of the fact, and ordered judgment without any affidavit, no harm is done and no error committed.

Judgment affirmed, with costs.

Mortgage:—Assignment:—Transfer of Note:—Payment to Holder:—Bona Fide Purchaser:—Failure to Produce and Deliver Securities:—Notice:—Duty of Inquiry:—Indemnity:—Evidence:—Good Faith.

FREDERICK HAESCIG v. JOHN W. BROWN. Appeal in Chancery from Kalamazoo Circuit.

Mason & Melendy, for complainant.
Severens, Boudeman & Turner, for defendants.

MARSTON, J.:

This is a bill to enjoin the foreclosure of a mortgage executed by complainant to secure the payment of a promissory note dated December 13, 1865, payable to James Tripp, or bearer, and which complainant alleges had been paid by him to Mrs. Tripp, the owner and assignee of the note and mortgage. This note and mortgage were given for a part of the purchase price of the lands mortgaged. It is claimed by the complainant that Mrs. Tripp had an interest in the lands, and that she refused to sign the conveyance until her husband had agreed to allow her this note and mortgage for her interest; that she received and retained possession of the same; that in the fall of 1866, Tripp and wife separated, and it was then agreed she should have half the property, and should retain this note and mortgage as portion of her share; and that she then handed them to her brother, in presence of her husband, to collect and retain the money for her. Defendant claimed to have purchased the securities in question of Mr. Tripp in July, 1866; that he then paid $50, and afterwards, in September, paid $450, and gave his notes for the balance, and received a written assignment, and that in December following he notified complainant of such assignment.

Held, 1. That the proofs clearly sustain complainant's claim; that although the evidence is not express, the fair inference is that defendant obtained information of complainant's rights before he made the September payment and received the assignment; that the fact that Tripp did not have the note in his possession either in July or in September, or produce and deliver it, or account for its absence, should have put defendant upon inquiry.

Held, 2. That the fact that complainant, when he paid the note to Mrs. Tripp, insisted upon and received indemnity against loss thereby, is not, under the circumstances, suspicious as claimed, but was a proper precaution on complainant's part, and indicated rather that in Mrs. Tripp's opinion defendant's claim was worthless, than that it was of any value or validity.

Decree affirmed, with costs.

Ejectment:—Landlord and Tenant:—Termination of Tenancy:—Dower:—Assignment of, in Probate Court:—Questions not Raised.

MAGGIE GUSTIN v. CYNTHIA BURNHAM et al. Error to St. Clair Circuit.

A. E. Chadwick, for plaintiff in error.
Mitchell & Avery, for defendant in error.

COOLEY, CH. J.:

It is inferrible from the imperfect finding of facts in this case, that administration was had on the estate of James L. Gustin, and that defendants hold by purchase from the administrator; that when they went into possession it was under an understanding with the plaintiff that they should have the occupation and enjoyment, not only in their own right, but also in her right as dowress, rendering to her a reasonable compensation by way of rent, the amount of which, however, was not agreed upon.

Held, 1. That if such was the understanding the circuit judge had of the facts, he was right in holding that the plaintiff could not maintain her action of ejectment without first terminating the tenancy.

Held, 2. That whether he was also right in his suggestion that the plaintiff might have had her dower assigned in the probate court, is a question not involved in this suit, and which would depend on other facts than those which are embraced in this finding.

Judgment affirmed, with costs, and cause remanded, to give plaintiff an opportunity to take a new trial under the statute, should she so elect.

Deeds:—Executed in Blank:—Delivery:—Agency:—Authority in Writing:—Notice.

JESSE G. LINDSLEY v. JOHN A. LAMB. Error to St. Clair Circuit.

Brown & Farrand, for plaintiff in error.
Chadwick & Voorheis, for defendant in error.

CAMPBELL, J.:

This is ejectment. The case finds that Avery W. Stowells was a former owner of the lands in controversy, and that he resided during his lifetime at Syracuse, N. Y., and died there in 1844, leaving a widow, now Louisa S. Norton, and one child and heir-at-law, Elizabeth P. Bradley, both residing in California, in April, 1868; that on April 13, 1868, these two persons, with their hus-

bands executed and acknowledged in California, before two witnesses and a Michigan commissioner, a blank quit-claim deed, containing no name of grantee, no consideration and no description of property; that the deed in that condition came into this State, but in whose custody it does not appear; that somebody not disclosed made a bargain for the sale of the land, filled in the blanks, the plaintiff in error being named as grantee, and that the deed was recorded in September, 1868, but by whom or under what circumstances left for record does not appear; that it was afterwards delivered by Mrs. Norton to the attorney for the plaintiff in error. The circuit court held that these facts did not make out title.

Held, That the case is too bald to require discussion; that if such a deed could become operative under our statute requiring an agent's authority to be in writing, it could only be by estoppel; that there can be no deed without a grantee; that as the case stands it presents the simple question whether a conveyance in blank, received by a party with full knowledge, is equally valid with a formal deed, completely executed and acknowledged and perfect in all its parts, and that question can have but one answer, and that on the facts as found there is nothing to show any right either legal or equitable.

Judgment affirmed, with costs.

Father and Son:—Implied Promise:—Point not Raised:—Assignment of Errors:—Bill of Particulars:—Loan of Money:—Evidence of Loan of Bonds:—Evidence:—Pecuniary Responsibility of Plaintiff:—Rebuttal:—Admissions:—Interest in Farm:—Money Loaned to Pay off Mortgage.

SOLOMON S. WATERMAN v. JOSEPH D. WATERMAN. Error to Kalamazoo Circuit.

Severens, Boudeman & Turner, for plaintiff in error.
Arthur Brown and *Ashley Pond*, for defendant in error.

MARSTON, J.:

This was assumpsit, brought by Joseph D. Waterman against his father, for money loaned to him, money paid for his use and benefit, and money received by him for plaintiff's use, United States bonds loaned to him, for the value of certain personal property, and for one-half the value of a certain livery barn. It is urged that from the relationship of the parties the law would not imply a promise to pay, and that their conduct and treatment of each other shows that no understanding for payment was either given or relied upon, and therefore plaintiff was not entitled to recover.

Held, That as this point does not appear to have been raised

below, and as there is no assignment of error raising it here, and as the bill of exceptions does not contain all the evidence, the question cannot be considered.

Upon the trial plaintiff testified, under objection, that he at one time let defendant have a $200 bond. The objection was, that no such claim was set forth in plaintiff's bill of particulars. There are several items in the bill of particulars of money loaned to defendant, under which it is claimed this evidence was admissible.

Held, That though it be true that the object of a bill of particulars is to apprise the other party of the nature of the items relied upon, it does not follow that an item for money loaned would fairly apprise one that evidence would be given under it of the loan of a bond; that while under such a charge one might be expected to prepare to meet evidence of a loan of coin, bank bills, or any well-known circulating medium, popularly known and designated as money, yet he could hardly be prepared to show that he had not borrowed bonds or other obligations of well-known value, which might have been sold or negotiated by him, and thus converted into money.

It is claimed that the court erred in admitting evidence of admissions made by defendant that plaintiff had an interest in a certain farm, the title to which stood in defendant's name. Plaintiff claimed and testified he had furnished defendant with money to enable him to pay off a mortgage upon this farm; and he offered these admissions as tending to corroborate this testimony.

Held, That these admissions were proper to be submitted to the consideration of the jury.

It is further urged as error that the court excluded the securities which were paid off by defendant, and which he testified he had paid. There was no dispute about his having paid these securities, the plaintiff proceeding on the theory that he had paid them, but had been furnished the means with which to do it by the plaintiff.

Held, That as the introduction of the securities in evidence would have had no tendency to show where the money was procured with which they were paid, and as the payment of them by defendant was not disputed, it is apparent he was not prejudiced by the ruling excluding them.

Judgment reversed, with costs, and a new trial awarded.

Declaration:—Partnership:—Name:—Res Adjudicata.

PATRICK M. DANAHER et al. vs. THOMAS A. HITCHCOCK.

PER CURIAM:

There was nothing in the exceptions relied on in this case. That which relates to the want of an averment of defendants'

partnership is covered by *Pegg vs. Bidleman*, 5 Mich., and that which relates to the name is settled by the statute.

Judgment affirmed, with costs.

General Average :—Implied Promise :—Common Law Action :—Submission :—Arbitration :—Agreed Items :—Partners :—Authority :—Charge to the Jury.

Absalom Backus, Jr., et al. vs. Hugh Coyne. Error to Superior Court of Detroit.

Barbour & Rexford, for plaintiffs in error.

Moore & Griffin and *F. A. Baker*, for defendant in error.

Marston, J.:

Coyne brought assumpsit against Backus & Bro., upon a general average claim, which had been assigned to him by John Stewart. It is first objected that the doctrine of general average cannot be enforced in a court of common law, and *Rossiter vs. Chester*, 1 Doug., 154, is relied upon.

Held, 1. That as the main doctrine of that case, that admiralty jurisdiction did not extend over the great lakes of this country, has since been overruled by the U. S. Supreme Court, and the contrary doctrine is now universally recognized, the ruling of that case is not now binding.

Held, 2. That general average is founded on sound equitable principles, and that where a loss occurs which gives rise to the principle of general average, and the goods which have been saved by the sacrifice of other property have been delivered over to the owner, there is no good reason why a promise should not be implied upon the ground that in equity and good conscience he should contribute to the loss which others sustained for his benefit, nor why such promise might not be enforced in a common-law court.

Objection is also made to that portion of the charge to the jury which instructed them that the submission made by Absalom Backus to Mr. Clark was not a submission to arbitration, but was a mere submission to him to adjust or make the proper apportionment between the parties from items already agreed upon, and that he had authority, therefore, as a member of the firm of Backus & Bro., to bind his copartner by such submission.

Held, 1. That even conceding the distinction drawn by the court below to have been correct, the record does not bear him out in the assumption that Stewart and Absalom Backus had agreed as to the items and required only a proper apportionment; that the adjustment was not in accordance with custom, but in accordance with a special agreement of the parties, and sub-

mitted questions of fact and law, and the duties of Mr. Clark in the matter were not clerical merely, but required the exercise of judgment, and his decision was to be conclusive.

Held, 2. That while an agreement to abide by the statement of a third person as to a disputed fact, or a reference to a third person to make a mere clerical computation from an agreed state of facts, might not be analogous to a submission to arbitration; yet, where witnesses are examined, and the person to whom the submission is made is called upon to exercise his best judgment, and to conclusively decide between the parties according to the law and the facts, upon a consideration of testimony and arguments, this must be considered a case of arbitration, and beyond the power of one partner to make on behalf of the firm, without a special authority for that purpose from his co-partners.

Judgment reversed, with costs, and a new trial ordered.

Tax Liens:—Subsequent Tax Title:—Priority:—Attacking Tax Title:—Title:—Claim for Taxes Paid:—Subordinate Demand.

LUCINDA A. ROBBINS et al. vs. WILLIAM B. BARRON. Error to St. Clair Circuit.

Atkinson Bros., for plaintiffs in error.

George Wasey and *D. C. Holbrook*, for defendant in error.

PER CURIAM:

In this case a judgment is entered declaring the amount paid for tax titles and for taxes by Barron a paramount lien on the land, and the land is ordered to be sold for satisfaction of the amount. This is done on the assumption that his tax titles did not convey the land, and in the face of the subsequent tax title of John Atkinson. This the judge finds is invalid, but on grounds that would not invalidate a lien on his behalf for the amount of the tax paid.

Held, 1. That there is no tenable ground for giving to Barron's lien a preference over that of Atkinson.

Held, 2. That there are some difficulties in giving a proper construction to the statute under which Barron obtained judgment for taxes paid, but they are not important here, because in any view he showed no right of recovery; that the statute (Comp. L., sec. 1130) limits the right to question a tax title to one having "title," and the circuit judge expressly finds Barron has no title; that Barron had only a claim for taxes paid, which, for all that appears in this record, if not cut off by Atkinson's purchase, would certainly be subordinate to it.

Judgment reversed, with costs, and new trial ordered.

Sales :— Agency: — Undisclosed Principal: —Contracts: —Payments:—Conditions Precedent:—Breach of Contract—Right of Action:—Verdict:— Findings of Fact.

ISAAC N. JENNESS vs. MARVIL SHAW. Error to Lapeer Circuit.

Gaskill & Geer and *M. E. Crofoot*, for plaintiff in error.
A. C. Baldwin, for defendant in error.

CAMPBELL, J.:

Shaw recovered judgment for the value of certain logs furnished to Jenness. The case tended to show that Jenness made an oral bargain with one Phelps for the purchase of the logs to be cut from two parcels of Shaw's land, and delivered, one parcel in the winter of 1866–7, and the rest the next winter. The price was to be $7 a thousand, of which $2.50 per thousand was to be paid when the logs were put afloat, and the remainder subsequently. It was claimed, and the jury must have found, that Jenness did not pay what he agreed. The declaration was on the common counts, and the recovery was for the contract price.

Some of the errors alleged relate to the right of Shaw as an undisclosed principal to sue on his agent's agreement. The jury must have found under the charge that Shaw had not sold the logs to Phelps before the Phelps sale to Jenness.

Held, That Shaw being under the finding the only person entitled, there can be no doubt of his right to sue upon a sale made by his agent, whether known to be such or not, but it is questionable whether the question arises here, since upon the finding, coupled with the proof on both sides, it seems Jenness could not have been ignorant of the ownership.

The remaining questions rest upon the assumption that the contract was an entirety, and could not be sued upon until either fully performed by Shaw, or rescinded by Jenness, or by mutual consent.

Held, That the evidence of the contract being all parol, and not harmonious, it was for the jury to determine what it was; that the plaintiff insisting that certain payments to be made by Jenness were conditions precedent, and the court having instructed the jury that Shaw's right to refuse further performance depended on whether such payments were conditions precedent, the verdict is paramount to a finding that they were so, and that Jenness, therefore, by a failure to pay as agreed, necessarily lost all right to require the further fulfillment of the contract, and it needed no rescission by him; and that the charge was as favorable as he could have asked, and the plaintiff had a right to sue for the contract price of the logs furnished, if he did not care to prosecute for any other breach.

Judgment affirmed, with costs.

Highway Commissioners:—Bridges :—Contracts :—Town Meeting :—Regularity of Proceedings :—Record:—Intendments:—Parol Evidence :—Ratification :—Authority:—Agency :—Townships : Public Use of Highway.

TOWNSHIP OF FAYMOUTH VS. CLARKSON A. KOEHLER. Error to Saginaw Circuit.

Gaylord & Hanchett, for plaintiff in error.
Wisner & Draper, for defendant in error.

MARSTON, J.:

Koehler sued the township in assumpsit to recover the value of certain iron furnished for the construction of a bridge, under a written agreement with one of the Highway Commissioners.

The questions raised and discussed relate (1) To the authority of the highway commissioner to authorize the making of the contract in question, which is claimed to depend on the regularity and validity of a special meeting of the people of the town called to vote moneys to build this bridge; (2) whether the board had authorized the making of the contract; and (3) whether there was or could be a ratification by the board of the acts and contract of the commissioner who made the contract, such as to render the township liable in case of a contract not valid in the first instance.

Held, 1. That while there should be proper written evidence on file or of record, showing that the statutory preliminary requirements to a legal meeting had been complied with, and that the meeting had been held, and the proceedings thereof, yet to require the utmost strictness in this respect would result in many cases in rendering void the proceedings of such *quasi* corporations, and that, therefore, their proceedings should be liberally construed, and all proper intendments made in favor of their regularity.

Held, 2. That while parol evidence is not admissible to contradict the record of such proceedings, it may be admitted to show facts omitted to be stated by the record, and that the rights of creditors or third persons cannot be prejudiced by the neglect of the clerk to perform his duty in this respect; that this is very different from the record of authority to raise a tax; that the board had authority under the statute (Comp. L., sec. 1306) to appoint one of their number to superintend the work, and he would thereby become the agent of the township for that purpose; and that such appointment may be by parol; that it should appear, however, that the meeting at which such appointment was made was legally called and held, or that all were present and participated, but that a unanimous vote was not necessary.

Held, 3. That there may in certain cases be a ratification by a corporation of an unauthorized contract, provided it be one that could legally have been entered into by the corporate authorities; that in certain cases acceptance and use of the work done, with full knowledge that it was done for the use and benefit of the corporation under an unauthorized contract, may, perhaps, in some cases, amount to a ratification, but that this is not one of that class of cases; that the fact that the people made use of the bridge in traveling along the highway would not be an acceptance, and could not be so construed; that the proper parties to ratify a contract are those who could in the first instance have legally made the contract, and the people of the township had no such authority, neither had the members of the board individually; but that if the board, at a meeting duly called, or at a meeting of all the members without any call, had approved and ratified the work, the township would be bound by such action.

Held, 4. That the contract in question, being one apparently within the general powers of the board, a person entering into it with one of the commissioners has a right to assume that the contract is in fact, as in appearance, a proper one, and if he goes on in good faith, without notice of any lack of authority, and furnishes the materials under the contract, he is entitled to recover, provided that the commissioner was either authorized to make the contract, or that his action was afterwards ratified by the board.

Judgment reversed, with costs, and a new trial granted.

Highways :—Discontinuance:— Notice :—Narrow Strip :—Private Way :—Outlet to Lands Lying Back :— Right to be Heard.

THE PEOPLE ex rel. JOSEPH PHILIPS vs. HIGHWAY COMMISSIONER OF CHINA. Certiorari.

Del. C. Hunton, for relator.

No counsel appeared for respondent.

GRAVES, J.:

This suit is brought for the review of proceedings for a discontinuance of a portion of a public highway known as the "Lozen Road." The objection to the proceeding relates to notice.

Held, 1. That the case of *Ross v. Highway Commissioner of Taylor*, 32 Mich., 301, explicitly decides this, unless the peculiar situation of the relator creates an exception.

Held, 2. That the relator, being owner of a 40-acre lot, lying back from the road in question, and connected with it by a private way, and from which there was no other outlet, was entitled

to have notice and to be heard; that the narrow strip of his private way is to be considered as an addition to the parcel lying back, and his right is in itself as perfect as if he owned and occupied for a mile along the highway.

Proceedings quashed, with costs to relator.

Trover:—Ownership:—Evidence:—Statements:—Admissions:—Rulings that do not Prejudice:—Conversations:—Family Matters:—Matters Equally Known to Deceased:—Evidence:—Charge to the Jury:—Father and Son:—Transfers in Consideration of Support.

THEODORE W. CHAMBERS vs. AUGUSTUS H. HILL. Error to Kalamazoo Circuit.

Severens, Boudeman & Turner, for plaintiff in error.

May, Buck & Powers, for defendant in error.

COOLEY, Ch. J.:

This action was trover, brought by defendant in error, as administrator, against the plaintiff in error, a son of the decedent, to determine the ownership of certain farming implements, stock, etc. A witness for defendant having testified to living in the family, was asked how the intestate generally spoke about the ownership of the property, and replied: "as being Theodore's," —the defendant's. This evidence was stricken out on motion, no reason being assigned. It is now urged that the answer was objectionable as giving only the conclusion of the witness from what she heard, and not giving the words used.

Held, *1*. That this suggestion has no force: that, while the words should be given where they can be, the general answer is not objectionable, and might well have been the only one the witness could have given; that the main fact would be likely to impress itself upon the mind, while particular expressions might not be noted or retained.

Held, *2*. That the ruling did not prejudice the defendant, since the same witness was allowed to testify fully to statements of the decedent covering the same ground substantially.

The defendant's claim was, that his father and mother had turned over to him the property in question, and that which produced it, in consideration of his undertaking to provide for them during their lives. On the part of the plaintiff, evidence was given, among other things, that defendant at one time in 1869 talked with his father and mother about leaving the farm and

going south, assigning as a reason that the family was too large; and that he was told by his father to go if he wanted to. The defendant, when on the stand subsequently, was asked if he made any such statements, and objection was made that the question related to matters equally within the knowledge of the deceedent, and the evidence was ruled out.

Held, That as the alleged conversation, though it may have been heard by third parties, was one between defendant and his father as parties concerned, and related to their own business, it is reasonable to assume that the facts concerning it were better known to them than to others, and that it therefore came within the reason of the statute, and its exclusion was not error.

Subsequently, a witness for defendant, who had testified to having lived in the family some, was recalled, and was asked if she had heard any conversation in the family concerning the son going south. This was excluded on objection.

Held, That as the witness was not shown to have lived in the family at the time, and it was merely negative testimony which was sought to be drawn out, and which could have no reasonable tendency to disprove the alleged conversation, its exclusion was not error; that the fact that a matter of family concern is not talked about before those not belonging to the family is no evidence that it is not talked about in the family.

The circuit judge instructed the jury that if they should find that the intestate promised defendant that if he would take care of him and his wife while they lived he should have the property after their death, or after they had done with it, but that such personal property was not actually transferred to defendant in the lifetime of the intestate, the promise would be no defense to the suit; and, also, that if they should find defendant had failed to establish the fact of an absolute transfer of the property, but that the agreement was that defendant should have the property that should be left after the parents' decease, then such arrangement would not transfer the personal property in question, but would be void, and no defense to this action.

Held, *1.* That this instruction ignores the vital question whether the property in dispute ever belonged to the father at all, and also whether, if it was not the defendant's, the title was not in his mother, who owned the farm, in which case this action of trover must fail.

Held, *2.* That it assumes there was evidence that the arrangement was that the title should not pass to the son until the death of the survivor of the parents, while the evidence in fact did not tend to show such an arrangement, but rather one contemplating an immediate and actual transfer of the property to defendant's possesssion and control, in consideration of his undertaking to support and provide for his parents; and that if defendant made out such an agreement, he was entitled to a verdict, and if he

did not, and the jury were satisfied the property belonged to the father at the time of his decease, the verdict was correct, and that this instruction was well calculated to mislead the jury.

Judgment reversed, with costs, and a new trial ordered.

Equity Jurisprudence :— Interpleader :— Independent Contract Liability.

HOBART SPRAGUE vs. JAMES B. SOULE et al. Appeal in Chancery from Ottawa Circuit.

Taggart, Simonds & Fletcher, for complainant.
Charles E. Soule, for defendants.

MARSTON, J.:

This bill was filed as a bill of interpleader, and it alleges that complainant incurred the liability under an express agreement with some of the defendants.

Held, That a bill of interpleader is defined as a bill for the protection of a person from whom several parties claim legally or equitably the same thing, debt or duty, but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter, and that this complainant, having incurred an independent contract liability to some of the defendants, is not entitled to the relief prayed.

Decree affirmed, with costs.

Promissory Notes:— Defenses and Compromises:— Fraud:— Findings of Fact—Special Verdict:—Rulings that do not Prejudice.

ALLAN SHELDEN et al. vs. BYRON M. DUTCHER. Error to Macomb Circuit.

R. P. & J. B. Eldredge, for plaintiffs in error.
Atkinson & Atkinson, for defendant in error.

GRAVES, J.:

Plaintiffs sued on a note given to them by Dutcher, November 1, 1872, for $487.43. The defense set up was an executed compromise of the debt represented by the note. The cause was tried by the court without a jury, and special findings were filed, and judgment passed for defendant. These findings, however, relate exclusively to the validity of the defense set up.

Held, That the questions argued in this case as to the effect upon a compromise with creditors of a secret arrangement with some of the creditors to pay them in full, are not raised by this

record; that the facts found are not in any event sufficient to authorize a judgment for the plaintiffs, and the judgment rendered for the defendant cannot therefore be disturbed; that there is no finding that defendant ever gave the note sued upon, or that the plaintiffs are holders of it, but the facts found relate to the defense and the reply to it, and not at all to the plaintiff's ground of action; that special findings of fact are analagous to a special verdict, and cannot be enlarged or extended by intendments or inferences; that there is, moreover, no distinct finding that any fraud was committed against the plaintiffs, but facts are found tending to show it; and that this is not sufficient, but that a finding of the fact of fraud is just as indispensable in such a case to a judgment for plaintiffs, as that of conversion is in an action of trover.

Judgment affirmed, with costs.

Sales of Goods:—Furnishing Vessels to Receive Delivery:—Reasonable Time:—Delivery:—Evidence:—Subsequent Testimony:—Error:—Charge to the Jury:—Exceptions.

HENRY BOLTON et al. vs. JOHN RIDDLE et al. Error to Alpena Circuit.

R. J. Kelley, for plaintiffs in error.
J. D. Holmes, for defendants in error.

COOLEY, Ch. J.:

Defendants in error contracted with plaintiffs in error to cut, during the winter of 1871–2, 15,000, and not to exceed 20,000 cedar posts, and to deliver them on the rail of vessels to be furnished by the plaintiffs in error, for the price of seven cents each. The posts were cut and placed on the beach, but vessels were not furnished for shipping them until 1874. Such as were then taken by plaintiffs in error were delivered on the vessel at their own expense. In an action to recover the price of the posts, plaintiffs in error claimed that they were entitled to deduct the cost of taking the posts from the beach and placing them on the rail of the vessel. The circuit judge ruled that the purchasers were bound to furnish vessels within a reasonable time during the season of 1872, and that failing in this they could not require the sellers to deliver the posts on board of vessels afterward.

Held, That the circuit judge was right in this ruling unless there was something in the evidence tending to show an alteration in the original agreement, or that the sellers assented to the delay in furnishing vessels.

There was evidence of a new arrangement made between the parties after the year 1872, and plaintiffs in error offered to show

what it cost them and what it was worth to load the posts when they shipped them in 1874.

Held, That at the time of offering that evidence they had not in any way laid the foundation for it, by showing facts which would entitle them to charge the sellers with this expense, and hence it was then irrelevant, and that the subsequent introduction of evidence which would make it relevant would not make the previous rejection erroneous.

It is urged that the circuit judge, notwithstanding the rejection of this evidence, submitted the question to which it related to the jury.

Held, That the charge is a little blind and it is not clear that the fact was as alleged, but if it were so it would not affect the previous ruling, as subsequent evidence may have called for such a charge, and that no exception covers the point.

Judgment affirmed, with costs.

Chattel Mortgages: — Filing: — Town Clerk: — Official Dereliction: — Authority to Sell: — Title: — Security: — Authority to take Possession: — Duty to Deliver: — Identifying Property: — Confusion of Goods: — Future Acquisitions: Estoppel: — Preferences.

THE PEOPLE, for the use of Farrington et al., vs. ULYSSES D. BRISTOL et al. Error to Lapeer Circuit.

Gaskill & Geer and *M. E. Crofoot*, for plaintiffs in error.

W. W. & M. N. Stickney, for defendants in error.

CAMPBELL, J.:

This suit was brought on a sheriff's bond, to recover damages for the failure of an officer to enforce an execution against certain property sold under a chattel mortgage. The chattel mortgage was given by one Reed to Saterlee, Blackwell & Co., covering a general stock of merchandise, and furniture and fixtures, and authorized a seizure in case the mortgagees should deem themselves insecure or in case of sales out of the usual course of business, Reed being permitted to make sales in the ordinary way, and required to pay the debt as it fell due therefrom. The mortgage having become due, a deputy of the sheriff was employed by the mortgagees to seize the property and enforce the mortgage. He took possession of the whole stock, and being informed there were some new goods, requested the mortgagor to point them out, which he refused to do. Before the sale, attachments and executions against Reed were put into the deputy's hands. He sold first goods enough to satisfy the mortgage, and then applied the proceeds of the residue upon the executions, leaving some of them

unsatisfied. The mortgage when given was at once filed with the town clerk, who was the mortgagor himself. He received and endorsed it, without demanding or receiving his statutory fees. He did not enter it or file it with the other mortgages, but left it in another pigeon-hole.

The plaintiffs claimed to recover (1) because of the defective filing; (2) because of the permission given to the mortgagor to sell, and his action thereunder; and (3) because goods were sold on the mortgage which were not included in it.

Held, 1. That the filing was all that the law required to be done by the party; that it in no way concerned any one else than the officer himself whether his fees were paid, and cannot invalidate securities he has accepted and filed, if he chooses to give credit for fees or remit them.

Held, 2. That the validity of the authority left in the mortgagor to sell in the usual way is no longer open to controversy in this State; that much of the doctrine concerning the effect of such permission depends on a theory which does not prevail here, where mortgaged chattels are held to belong to the mortgagor, and the mortgage to be a mere security, and not a transfer of title; that the mortgagor, therefore, while remaining in possession, is not the agent of the mortgagee, but the owner of encumbered property, and that permission to sell at retail is permission to pass title, free from encumbrance, and is not to be regarded as payment to himself as agent, by himself as agent, of a debt due from himself as principal.

Held, 3. That under a mortgage conferring on the mortgagee a right to take possession, there is a corresponding duty in the mortgagor to deliver it, and that involves a duty of identifying the property; that while there may not have been here any such confusion of goods as to absolutely destroy their identity, yet, if they could not be distinguished except by the mortgagor's aid, and he refused that aid, the case comes practically within the reason of the rule; that the rule cannot be confined to particular commodities, but must be made co-extensive with the mischief, and when one has wilfully destroyed all means of identification, he must be held responsible for the natural consequences.

Held, 4. That though this mortgage does not in terms contemplate a lien upon future acquisitions, it does contemplate that the stock on hand, and all its proceeds, shall be bound, and that a very strong equity therefore would arise in favor of the mortgagees, as against the future additions, as the result of the same business, and as practically substituted for the goods sold; and that while that equity would not prevail against a levy made before it had become no more than a general equity, it would prevail where by valid and formal agreement or otherwise it had become actually attached to the goods before the levy.

Held, 5. That as the laws of this State allow a debtor to prefer

one creditor to another, and to use any of his property to pay or secure his honest debts, a levy cannot invalidate prior lawful dispositions in favor of honest creditors, and what Mr. Reed could lawfully have done voluntarily is no more valid against him than what binds him by estoppel; and that the proceeds of the sale were properly applied in this case.

Judgment affirmed, with costs.

Garnishee Proceedings:—Joint Defendants:—Service on One Only:—Judgment:—Justice's Courts:—Clerical Error:—Evidence:—Building Contracts:—General Objections:—Assignee of Contract.

CHARLES ZIMMER vs. GEORGE DAVIS et al. Error to Wayne Circuit.

Prentis & Fox, for plaintiff in error.

Baker & Campau, for defendants in error.

CAMPBELL, J.:

Zimmer was summoned in justice's court by defendants in error as garnishee in a suit brought by them against John Turner and John Smith. He answered that he had a contract with the principal defendants for a house, on which he would owe them, when completed, $422, less any damages there might be for non-fulfillment. On the trial the evidence showed the completion of the contract by the contractors, and by plaintiffs as their assignees, within a short time after that fixed. The damages for delay were fixed by the contract at $10 a week, and would not reduce the price to the amount of the judgment into more than $100. The garnishee alleges as error, among other things, the admission in evidence of the docket entry of the judgment against the principal defendants, and certain explanatory testimony showing a clerical error therein. The docket showed a joint suit, and but one defendant served with process. The justice swore this was a clerical error for "defendants."

Held, That as the statute (C. L., sec. 5,377) requires that when only one of two joint debtors is served the judgment shall be in form against them both, a finding against one indicates sufficiently what judgment the plaintiff is entitled to, and his rights are not affected by a clerical misprision of the justice; that when the record shows clearly the right adjudicated, it cannot be defeated by a merely formal defect.

Plaintiff Davis, having been called as a witness, and having swore that he furnished materials for the house in question, was asked how he knew the building had been completed according to

the plans and specifications. This was objected to, but no ground stated, and the objection overruled.

Held, That the question was not irrelevant, and as the witness's previous testimony is not detailed, the record, as made up, does not show that the question was open to a general objection.

Held, further, That as Zimmer was bound to pay for the house if built properly, it did not concern him whether it was done by his contractors or by plaintiffs as their assignees, so long as he was not called upon to pay any more than the contract required.

Judgment affirmed, with costs.

Criminal Law:—False Pretenses:—Information:—Reliance on Representations:—Charge to the Jury:—Representations that Lots are Nicely Located:—Value:—Caveat Emptor.

THE PEOPLE vs. MARION JACOBS. Exceptions from St. Joseph Circuit.

A. J. Smith, Attorney General, for the People.

J. W. Flanders and H. H. Riley, for respondent.

GRAVES, J.:

Jacobs was convicted on a charge of having obtained money of one Barts by false pretenses. The alleged false representations were charged to have been made concerning some land belonging to Mrs. Jacobs, upon a mortgage of which he borrowed $500 of Barts. These representations were, that the lots in question were within the city limits of Grand Rapids; were on the street running directly from the business part of the city to the fair grounds; were nicely located; were quarter-acre lots, and together constituted one square acre; would sell at any time at $1,200 to $1,500, cash; were worth much more, and were entirely free from encumbrance.

It is claimed the information set up no offense, inasmuch as it fails to explicitly allege that Barts relied on the representations.

Held, That it was not essential to charge in express terms that he gave credit to the false pretenses, as this is a neeessary implication from the averment that he was induced thereby to part with his money.

The court charged the jury that if they believed, from the evidence, that any of the pretenses charged were proved to be false and fraudulent, and were part of the moving cause which induced Barts to part with his money, etc., they would be justified in finding him guilty.

Held, That this instruction left the jury at liberty to convict upon any of the distinct pretenses set up, and some of them were

not of a character to support a conviction, such as the one that the lots were nicely located, and the one concerning their value; that such representations cannot be considered as assertions of the existence of any fact or circumstance upon which any reasonable, prudent man would place reliance in parting with his money, and they are not such representations as can be made the subject of criminal prosecution as false pretenses.

Exceptions sustained, and verdict set aside.

Partnership:—Dissolution:—Authority of Partner in Winding up Affairs:—Promissory Notes:—Assuming Debts of Concern:—Principal and Surety—Extending Time of Payment:—Additional Interest:—Release of Surety.

ELDAD SMITH et al. vs. ALLAN SHELDEN et al. Error to Wayne Circuit.

C. & W. N. Draper and *C. I. Walker*, for plaintiffs in error.

Meddaugh & Driggs, for defendants in error.

COOLEY, Ch. J.:

Prior to June, 1867, Eldad Smith, Isaac Place and Francis B. Owen were partners in trade, under the firm name of Place, Smith & Owen, and as such became indebted to defendants in error in the sum of $969, on book account. In June, 1867, the firm was dissolved, Place buying out his partners and agreeing to pay the debts. Defendants in error were informed of these facts, and thereupon, without the knowledge of Smith or Owen, they took from Place a note, in the firm name, for the amount, with ten per cent interest. They did not agree to receive this note as payment, but they kept it and continued their dealings with Place, who made payments upon it, though not enough to keep the interest paid. In 1870 Place became insolvent and made an assignment, and Smith was called upon to pay the note, and suit being brought, judgment was recovered against him for the original indebtedness.

Held, 1. That on the dissolution of a co-partnership the partner intrusted with the adjustment of the liabilities has no implied authority to bind the other co-partners by giving notes in the name of the firm which shall amount to new contracts, imposing increased or additional burdens.

Held, 2. That the relation of Smith and Owen to Place became, after the sale to him and the undertaking on his part to pay the debts, in legal effect that of sureties to a principal debtor, and creditors knowing the situation, were bound in their subsequent dealing regarding their debts not to lose sight of the equities of the sureties.

Held, 3. That Smith and Owen were discharged by the arrangement made by the defendants in error with Place, by taking his note on time, with knowledge that he had become the principal debtor, and without the consent or knowledge of the sureties; and the fact that the time given was but short does not affect the result; that the note, moreover, bore interest, so that the creditors received or bargained for a consideration for the indulgence granted, and which ended in the insolvency of Place; that these creditors having thus bargained for an advantage which the sureties were not to share with them, it is neither just nor lawful for them to turn over to the sureties all the risks.

Judgment reversed, with costs, and a new trial ordered.

Replevin Bonds :—Sureties :—Evidence:—Files:—Executions:—Immaterial Rulings:—Res Adjudicata:—Briefs of Counsel:—Former Judgment:—Charge to the Jury:—Construction:— Arrangement to Release Principal:—Discharge of Sureties:—Records:—Presumptions.

ROBERT L. GREENLEE vs. STEPHEN L. LOWING et al. Error to Ottawa Circuit.

Edwin Baxter, for plaintiff in error.

Akeley & Stewart, for defendants in error.

MARSTON, J.:

This was an action upon a replevin bond. Plaintiff having introduced in evidence the bond and assignments thereof, and a portion of the files and proceedings in the replevin suit, showing a judgment and two executions, the defendants were allowed to introduce in evidence two other executions, issued upon the same judgment, one in form an execution in assumpsit, and the other improperly addressed to the coroner, and this is alleged for error.

Held, That if a party introduces a part only of the files in a case, the other side may put the residue in evidence, and if the whole of them show the plaintiff has no standing in court, they are properly admissible for that purpose; that, whatever may have been the effect of introducing these irregular executions, if standing alone, the other executions introduced having been properly issued and returned, these became of no sort of consequence.

Evidence was given tending to show that Lucy Ridell, the plaintiff in the replevin suit, resided in Kent county when the judgment in the replevin suit was obtained, and had property there until quite recently; also, that the plaintiff in this suit had

a private arrangement with said Ridell by which she was released, and plaintiff was to prosecute, and make what he could out of the sureties.

Held, That this evidence was admissible, as it tended to show that plaintiff had not in good faith endeavored to collect from the plaintiff in the replevin suit before resorting to the sureties on the replevin bond, and so tended to support the showing of an arrangement with the principal obligor on the bond, to the prejudice of the sureties.

The main question grew out of rulings in reference to a former trial and judgment upon the same bond. After the files and judgment had been admitted in evidence, plaintiff's counsel offered in evidence the brief of defendant's counsel upon the former trial, to show that the only point contested was the sufficiency of the return of the execution to prove a breach of the bond, and that, therefore, the former judgment was not upon the merits, and not a bar to this action. This was rejected.

Held, That this ruling was correct; that briefs of counsel are not an unerring indication of the basis upon which a judgment has been rendered, as they sometimes omit to discuss questions considered by the court, and frequently discuss those not involved in the case, and that the brief was not admissible for the purpose for which it was offered in evidence.

Objection is taken to a paragraph of the charge on the subject of the bar of the former judgment.

Held, That the charge must be construed as a whole, and so construed, it correctly lays down the rule that both the issue and judgment must have been taken and rendered upon the merits in order to be a bar.

Complaint is also made of the charge as given and as refused upon the subject of the effect of making an arrangement with Ridell for her discharge.

Held, That if an arrangement was made with her whereby she was released from liability on the replevin judgment, this would release the sureties, unless made with their consent, which is not claimed to be the case here; and that if she was thus released, it would be of no consequence that instructions were given to the sheriff inconsistent with such arrangement, as that could not change the legal effect of the agreement previously made.

It is urged that a portion of the charge is not supported by any evidence.

Held, That the record does not affirmatively show that there was no such evidence, and that error will not be presumed.

Judgment affirmed, with costs.

Declaration:—Special Count:—Common Counts:—Bill of Particulars:—Charge to the Jury:—Evidence—Collateral Promise:—Original Undertaking:—Floatage of Logs:—Stoppage:—Subsequent Renewals.

EDWARD HALL vs. HENRY WOODIN. Error to Isabella Circuit.

E. Hall, in person, and *Walker & Kent*, for plaintiff in error.
Fancher & Hopkins, and *John Moore*, for defendant in error.

CAMPBELL, J.:

Woodin recovered judgment against Hall for the value of thirty-eight floods alleged to have been raised for the latter, to aid in the floatage of logs in the Chippewa river. The declaration contained a special count, claiming to recover for thirty-four floods, and also the common counts. It was objected that no more could be charged for under the common counts than were set forth specifically.

Held, That the common counts are independent of the special count, and a demand for a bill of particulars would be the proper means of ascertaining the exact extent of the plaintiff's demand, and in the absence of such demand, defendant must be prepared to meet any case admissible under the common counts, as if there had been no special count.

It appeared that in the early part of April, 1872, Hall was running a quantity of his own logs, which required help of more water to float them over some difficult places. Later, and in May and June, the logs below Woodin's dam were in charge of other persons, and belonged to a large number of interests. These all received the benefit of the principal part of the floodings. When Hall's logs were stopped in April, he informed Woodin of this fact, and desired him to furnish floods until directed to stop. Woodin furnished four, and then stopped, and no more were raised till after Hall's separate drives had gone forward, and the stream was occupied by others. Plaintiff claimed that Hall, with one of the men in charge of the later drives, went to Woodin and told him to let the floods come, and he presumed the Saginaw lumbermen would see him paid, and to keep on the floods and he would see him paid. The court charged that if Hall, when he so called on Woodin, agreed to pay for the floods, he was liable for all after that date, under the common counts.

Held, *1.* That this charge assumes the evidence made out an absolute and original promise to pay, and not one by way of guaranty, while the promise, as detailed by the plaintiff, pointed to the lumbermen as those primarily liable, and the only ones benefited, and Hall's undertaking was only a collateral one, to make good their obligation.

Held, 2. That the subsequent floods could not properly be attributed to the original contract, which was for an immediate purpose, and that a stoppage of several weeks was a practical discontinuance, after which nothing but a new order would justify renewal.

Judgment reversed, with costs, and a new trial ordered.

Declaration:—Informalities:—Clerical Misprision:—Demurrer:—Evidence:—Money paid to Defendant's Use:—Promissory Notes:—Indorsement:—Money had and Received.

DELAMERE BROWN vs. MICHAEL MCHUGH. Error to St. Clair Circuit.

Chadwick & Voorheis, for plaintiff in error.

Miles & Coe and *W. T. Mitchell*, for defendant in error.

GRAVES, J.:

Brown brought assumpsit, declaring upon the common counts. The count for money paid averred payment to the defendant, instead of to the defendant's use. The general issue was pleaded, however, and the cause tried upon the merits. Plaintiff's case was, that he purchased of defendant a span of horses, which defendant represented to be free from encumbrance, but that, in fact, they were mortgaged to one Ryan, to secure payment of defendant's note to Ryan for $100; that Ryan threatened to take the horses on this mortgage, and plaintiff thereupon paid the debt and took an assignment of the securities, but that the note was not formally indorsed until the time of the trial. The court charged that the plaintiff was not entitled to recover under the declaration and proofs.

Held, 1. That the defect in the declaration was a mere clerical misprision, and should have been disregarded, in the absence of a demurrer.

Held, 2. That the note was properly admitted, and was evidence going to support the count for money paid to defendant's use, independent of the statute in regard to suing on notes under the common counts, which had nothing to do with the case; and that plaintiff having acquired the equitable title to the securities, the indorsement of the note was mere matter of form, and could properly be made at the trial as well as any other time.

Held, 3. That the note was admissible, also, under the count for money had and received; and that the plaintiff was clearly entitled to have the case submitted to the jury upon the merits.

Judgment reversed, with costs, and new trial ordered.

Equity Pleading and Practice:—Setting Aside Decree:—Intervening Rights of Third Persons:—Petition:—Summary Proceedings:—Original Proceeding:—Suit at Law:—Remedy:—Trial of Issues.

JOHN H. CRAWFORD vs. RUTH TULLER et al. Appeal in Chancery from Branch Circuit.

Charles N. Legg and *Loveridge & Barlow*, for complainant.
E. G. Fuller, for defendant petitioner.

COOLEY, Ch. J.:

This is a petition to set aside a decree and sale in a foreclosure case. The sale was made in 1859. The petitioner, who was proceeded against as a non-resident mortgagor, insists that the court never obtained jurisdiction because of defects; and also claims she never gave the mortgage. The complainant is alleged to have deceased soon after the sale was made, and the land is claimed and occupied by a third party.

Held, That a party attacking a judicial sale as invalid, after rights of a third party have accrued, must do so by some original proceeding, in which an issue can be formed and tried in the ordinary way; that if petitioner never gave the mortgage, she has her remedy by ejectment, or, perhaps, by equity; and if she gave the mortgage, but the proceedings against her are invalid, a bill to redeem might be the appropriate remedy; that the rights of third persons cannot be adjudicated on a petition like this, but they must be brought into court as parties in some regular form.

Order affirmed, with costs.

Replevin:—Title:—Questions of Fact:—Contracts:—Agent:—Agreement to carry on Business and make Advances:—Title to Articles Manufactured:—Implements.

THE DETROIT FREAR STONE WORKS vs. ORPHEUS WHITE. Error to Wayne Circuit.

Moore & Moore, for plaintiff in error.
J. G. Dickinson, for defendant in error.

GRAVES, J.:

This was replevin. The parties entered into an agreement whereby White undertook to take charge of the company's stone yard, as superintendent, for one year, to furnish all moneys required to carry on the business, and to receive in full compensation therefor, and for his services, the net profits arising from said business. White for a time continued at the yard, when, without

the company's assent, he snddenly shifted to another place, carrying with him the monlds and other things belonging to the company, and began operations in his own name. The company protesting, he tnrned the lease of the new place over to them, and consented to go on again under the contract. Afterwards, however, he again shifted the concern without assent of the company, and the latter thereupon brought this action to recover some stone work and moulds. At the trial White insisted that the chattels were his, and claimed they had been prodnced by his labor and with his means, though he admitted that they were produced in the conrse of the business conducted under the contract. The evidence showed that the moulds and stone were of the company's stock, and that White had acknowledged their right to the property. The conrt below directed a verdict and judgment for defendant, and plaintiff brings error.

Held, That this ruling was error; that the facts should have been snbmitted to the jury; that the contract did not vest ownership in the defendant, and whatever possession and control it gave him was as agent of the company and not as owner; that in supplying the labor and means to carry on the enterprise under the contract, he was not procuring articles to be held as absolutely his own, bnt they became the property of the company subject to be disposed of as provided by the contract, and defendant, in getting possession under the contract, was bound to accept the net profits as therein provided for his services and advances, and conld not assert legal ownership of effects in lien thereof.

Judgment reversed, with costs, and new trial granted.

Mortgages:—Indemnity:—Partnership:—Real Estate:—Tenants in Common:—Partnership Use:—Presumptions:—Title:—Notice.

JOHN REYNOLDS vs. WILLIAM RUCKMAN et al. Appeal in Chancery from St. Joseph Circuit.

E. Bacon, for complainant.

Pealer & Andrews and *H. H. Riley*, for defendants.

COOLEY, Ch. J.:

This bill was filed to foreclose a mortgage given by Ruckman to complainant on June 24, 1871, to indemnify him for having become surety for Ruckman on certain specified notes, and also against future liability as endorser or acceptor of Rnckman's paper to an amonnt not exceeding $10,000. The mortgage was duly acknowledged and recorded, and complainant claims to have paid some $7,000 for Ruckman, for which the mortgage is holden. Defendant Emery is made defendant as subsequent purchaser, and he alone defends. His defense is, that when the mortgage

was given, he and Ruckman were partners, carrying on the mill on the premises, an undivided half of which was covered by the mortgage; that the premises were partnership property; that Ruckman was largely indebted to the partnership, as complainant well knew; that the copartnership was dissolved August 10, 1872, being then insolvent, and leaving nothing to pay Ruckman's debt to the firm except his interest in these premises, and that Ruckman conveyed the same to Emery in payment of such debt as far as it would go, but that it fell far short of full payment. The land was not conveyed to Ruckman and Emery jointly, but they acquired their interests at different times and from different persons. Nothing on the registry indicates that they held it as partners, nor was any agreement shown that it should so be held, nor was it shown that complainant knew the rights of the partners were other or different from that which the record would indicate, viz: those of tenants in common.

Held, That if the defense succeeds in this case it must be on the ground that lands owned by the partners ostensibly as tenants in common, but made use of for partnership purposes, is *prima facie*, as between the individual partners and third persons, to be regarded as pertaining to the partnership estate; that such a doctrine cannot be sustained; that the registry ought generally to be the guide on which parties may safely rely in dealing with the titles which appear there, and they should not be held chargeable with notice of equities controlling the title on facts which are ambiguous; that real estate held by partners may or may not be partnership property, and the fact that two or more persons make use of property in which their interests are apparently several for partnership purposes is far from indicating an understanding that it is partnership estate, of which third persons would be bound to take notice.

Decree affirmed, with costs.

Replevin:— Execution Levy:— Pleadings:— Waiver:— Bill of Sale:— Security:— Filing:— Sworn Copy:— Evidence:— Cross-examination:—Explanations:—Fraudulent Transfers:—Charge to the Jury:—Further Instructions.

NATHAN H. PIERCE vs. FREDERICKA REHFUSS. Error to Washtenaw Circuit.

D. Cramer, for plaintiff in error.

F. M. Pistorius and *E. D. Kinne*, for defendant in error.

MARSTON, J.:

This was replevin. Defendant with his plea gave notice that he took and held the property by virtue of certain executions

issued by a justice of the peace against plaintiff's husband, and that at the time of the levy plaintiff's pretended interest in the property was false and fraudulent under an agreement with her husband to cover up and conceal his property with intent to hinder and delay his creditors. It is claimed that the return day of the writ of replevin being Sunday, all the proceedings under it are irregular and void. No objection was made below upon this ground.

Held, That defendant having appeared, pleaded the general issue and gone to trial without objection, thereby waived the right to make any such objection.

On the trial plaintiff offered in evidence a sworn copy of a bill of sale of the property to plaintiff from her husband. This was dated November 28, 1874, and the original was filed in the town clerk's office, January 5, 1875. This was objected to, but admitted.

Held, That if the instrument in question was intended as a mere security for a debt, then it was properly filed, and the original being thus on file in a public office, the sworn copy was properly received in evidence.

It is objected that certain written instruments between plaintiff and her husband on the one part, and Christian Mack and Henry Paul on the other, were improperly admitted in evidence. Defendant's counsel had inquired concerning these instruments upon cross-examination of plaintiff as a witness.

Held, That the instruments in question were admissible in explanation of what had been thus drawn out on cross-examination.

Exceptions were taken to the charge of the court, and to the refusal to give certain of defendant's requests relating to the *bona fides* of the sale from plaintiff's husband to her.

Held, That this question was properly submitted to the jury under instructions to consider all the facts, and if from all the evidence they should find that the sale was in fact an absolute one in payment of a debt due from the wife, made without any intent to hinder, delay, or defraud the husband's creditors, their verdict should be for plaintiff, but that if made with intent to hinder, delay or defraud any of his creditors, they should find for defendant; that these instructions were as favorable to defendant as he had a right to ask.

After the jury had been out five hours, they returned into court and announced their inability to agree. The court thereupon instructed them as to their duty in endeavoring to reconcile their views and arrive at a verdict if consistent with their consciences, rather than that the parties should be put to the trouble and expense of trying the case over again. Complaint is made that the court should not thus charge the jury a second time, unless they ask for further instructions on some point, and should not urge them to agree, or make any remark to the prejudice of either side.

Held, That what was here said cannot be treated as legally prejudicial to either side, and that the court in thus instructing the jury was acting in the performance of a highly commendable duty, and this irrespective of whether the jury had asked for further instructions.

Judgment affirmed, with costs.

Mortgages:— Contracts:— Evidence:— Agreement to Pay Debt of Another:— Statute of Frauds:— Consideration:— Partition:—Lien on Undivided Interest:—Discharge.

FREEMAN WEBB vs. ROBERT ROWE et al. Appeal in Chancery from Ionia Circuit.

H. H. Harmon, for complainant.
Vosper & Wilson, for defendant.

MARSTON, J.:

Edwin H. and William Wilson claimed title to 80 acres of land as tenants in common by devise from George Barber, deceased; William retained exclusive possession of the west 40, and Edwin of the other. William conveyed his undivided interest in the land and certain farming tools to Robert Rowe, who gave back a purchase price mortgage for $1,100. Arrangements were then made between Rowe and Edwin H. for a partition, Rowe retaining the west 40 and Edwin H. paying him $75 as the agreed difference in value of the two parcels. The deed given by Edwin H. on this partition was a warranty deed, and that given by Rowe a quit-claim. Complainant having purchased the mortgage filed this bill to foreclose it. The west 40 had been discharged of this mortgage by complainant before the same was formally assigned to him, but not till after he had become purchaser and holder of the notes. It is claimed that defendant Wilson knew of the mortgage at the time of the partition and orally agreed to pay the same.

Held, *1*. That even if an oral agreement thus made to pay the debt of another would have been valid, there is no satisfactory evidence that any such agreement was ever made, nor is there any showing of consideration for such an agreement other than that the partition was made as stated.

Held, *2*. That the case bears no analogy to that of *Crawford vs. Edwards*, which holds a grantee, who has accepted a deed whereby he agrees to pay a mortgage, the amount of which is deducted from the purchase price, personally liable to pay the same; that there is here no equitable consideration requiring said Wilson, in the absence of any undertaking on his part so to do, to pay the mortgage here in question.

Held, 3. That the partition made between Rowe and Wilson operated, in analogy to a partition made under the statute, to transfer the lien of the mortgage to the west half of the premises, which would become the primary security for the payment of the debt; and that Webb, having voluntarily discharged the part thus primarily liable, after he had become at least the equitable owner of the mortgage, thereby lost any claim he might have had against Wilson's share of the 80, as the west 40 was at the time of such discharge worth more than the amount due and owing upon the mortgage.

Decree affirmed, with costs.

Homestead:—Settler's License:—Patents:— Reservation:— Canceling License:— Abandonment:— Non-residence:— Statute Construed:— Ex parte hearing:— Declaration of Forfeiture:— Witnesses:— Responsible Citizens:— Formal Certificate:—Notice.

JOHN HEDLEY vs. PAUL LEONARD et al. Appeal in Chancery from Huron Circuit.

George S. Engle and *Hoyt Post*, for complainant.

R. Winsor and *H. B. Carpenter*, for defendants.

CAMPBELL, J.:

Complainant in 1867 received a settler's license from the State Land Commissioner for 40 acres of land in Huron county, under sec. 3978 Comp. L. In June, 1873, he received a State patent under that license and in fulfillment of its conditions. He filed this bill to remove a cloud upon his title created by a patent issued in October, 1872, to defendant Leonard, who mortgaged the lands to defendant Richards, and conveyed it to defendant Gregory, who finally conveyed to defendant Patterson. Complainant avers this patent and the conveyances under it to have been fraudulently and illegally obtained with notice and in violation of his rights.

Held, 1. That the issue of the license and its subsequent confirmation by patent preclude any inquiry into the facts of settlement and occupancy except by some one who has obtained a right under the statutes to question them.

Held, 2. That the validity of the patent to defendant Leonard, which was for an ordinary sale of lands in the market, depends upon the jurisdiction of the authorities to issue it, and if the lands had been reserved from sale before its issue and that reservation was still in force, the issue of that patent was unauthorized.

The statute under which complainant's license issued provides for vacating such licenses (1) for a failure to file certain proofs of

settlement (which in this case were seasonably filed), and (2) upon certain proofs of waste (which it is not claimed were made in this case), and (3) for abandonment and failure to reside upon the lands for two years, which is relied upon here. On September 30, 1872, Arthur B. Wood and John Howarth made affidavit concerning complainant's lands, "that he has abandoned the same and has not resided thereon for two years last past," etc. Upon this affidavit and a supervisor's certificate that Wood and Howarth were responsible citizens of the township, the sale was made to Leonard as of lands in the market. The record does not show, either in averments or in proofs, that the commissioner ever made any declaration avoiding the license to complainant.

Held, 1. That under the statute such a declaration was a condition precedent to a sale to any one else, and it was never intended that such an avoidance should rest in inference.

Held, 2. That even if the commissioner was authorized under the statute to avoid the license on *ex parte* affidavits (upon which no opinion is expressed), it was at least incumbent on him to exercise his own judgment on the facts in question.

Held, 3. That for the purposes of forfeiture the statute requires two distinct causes, both of which must coincide, viz: non-residence and abandonment, and a very clear case must be made out to justify a forfeiture.

Held, 4. That the commissioner is bound to know that the witnesses whose affidavits he accepts and acts upon are responsible citizens, and when, as in this case, the supervisor who certified to the character of the affiants, within a week afterward, declares with equal positiveness that their affidavit to which he had appended his first certificate is a willful and corrupt falsehood, the formal certificate cannot be treated as conclusive or sufficient.

Held, 5. That assuming that action may be had *ex parte*, it cannot be conclusive against actual facts to the contrary of those acted on, and a licensee cannot be deprived of his rights; that nothing but complete and utter abandonment authorizes a license to be vacated under the statute, and those who proceed without notice and on mere affidavits can get no rights against the real facts, and the commissioner should see that the licensee has notice where it is practicable; that it is the express policy of the State to encourage the improvement of swamp lands by such licenses, and it is a perversion of that policy to encourage interlopers to enjoy the fruits of other men's labors.

In this case it is very clear that complainant made important improvements by clearing and draining, and kept up his occupation for that purpose. The only dispute is concerning residence.

Held, That non-residence is a very different thing from abandonment, and will not alone authorize the summary interference of the commissioner under the statute, and if a cause of forfeiture, it must be enforced otherwise.

The complainant is a single man, living with his father on an adjoining parcel which is used and partially enclosed with the tract in controversy; and the licensee resides there for the purpose of cultivating this land.

Held, That the spirit of the statute is not violated under such circumstances, merely because the house is off the land, and the proofs do not maintain such non-residence as the statute contemplates as a cause of forfeiture; that the obvious purpose of the law is to secure clearing and drainage, and a strained interpretation not called for by any grievance is not admissible; that an unmarried man who lives with his father in such close proximity to his own farm may be fairly said to reside on his own farm if such occupation is honestly designed as home occupation; that technical considerations should not be allowed to defeat what is a substantial compliance with the benevolent purposes of the statute.

Held, further, That the possession of complainant being open, so that no one could visit the land without seeing it, there can be no valid claim that defendants acted without means of knowledge, and the proofs indicate that their conduct was fraudulent throughout.

Decree below reversed, with costs of both courts to complainant, and a decree directed requiring defendants to release their claims.

Contracts:—Sales of Machines:—Fitness for Specific Use:—Warranty:—Implied Warranty:—Caveat Emptor:—Evidence.

THOMAS MCGRAW et al. vs. GEORGE N. FLETCHER. Error to Wayne Circuit.

T. C. Owea and *Moore & Moore*, for plaintiffs in error.

George E. Wasey, and *D. C. Holbrook*, for defendant in error.

GRAVES, J.:

Fletcher brought this action to recover the unpaid balance upon a contract for the sale by him to Eber B. Ward of a patent diamond drill. The cause was referred, and the referee reported the facts, and found plaintiff was entitled to recover $3,924.83.

Plaintiffs in error excepted to the report, and the court below overruled the exceptions and entered judgment as recommended by the referee. The objections are to the rulings (1) that on the facts as found there was no express warranty that the machine would do the work for which it was purchased, and (2) that there was no implied warranty to that effect. The referee finds that Fletcher knew Ward purchased with the design and for the purpose of using the machine in prospecting for minerals in Missouri

and elsewhere, and that it proved practically worthless in that business.

Held, That if there was an express warranty, there was no chance for implication.

The passage in the contract on which the plaintiffs in error rely as an express warranty is, that the machine was "to be complete in everything for working." This occurs as a term in the stipulation for the delivery of the machine by Fletcher at the depot in Chicago for shipment to such place as Ward should direct.

Held, That this had no reference to the ability of the scheme of the machine to work well in prospecting, or at all, but was an undertaking that the machine, such as it was in principle and range of usefulness, should be delivered prepared and equipped to do what in principle it was capable of doing.

It is claimed there was an implied warranty on the ground that Fletcher knew Ward was buying the machine for use in prospecting, that the former was to send an expert to Missouri to set it up and set it running, and informed Ward it was good for boring in rock and had been used for prospecting in many places, and that the most he had known it to cut in one day was fifty feet.

Held, That whether a warranty of utility in the working of a machine, in some special service not strictly within the sphere of action for which it was contrived, can be implied, must depend upon the particular facts, and the facts ought to be very strong to warrant the inference of an agreement by the seller that a machine contrived for work of a given kind and within a given range will operate well in practice in work of a different character or in work required to be carried on under conditions not agreeable to its plan or in harmony with its arrangements for being worked and kept in action; that the facts here not only fail to favor an implication of warranty, but on the contrary they invite the belief that it was tacitly understood that the machine should be taken at Ward's risk as to its ability to be used successfully in prospecting.

Judgment affirmed, with costs.

Corporations: — Stockholders: — Labor Debts: — Liability to Stockholder who has been compelled to pay Judgment against Company: —Statue Construed: —Contribution: Ratable Reimbursement: —Joint Judgment:

JOHN J. BAGLEY vs. LUTHER BEECHER. Error to Superior Court of Detroit.

Griffin & Dickinson and *Hoyt Post*, for plaintiff in error.

Fred. A. Baker, for defendant in error.

COOLEY, Ch. J.:

This was an action, under the statute (Comp. L. 1871, Sec. 2852), brought by one stockholder against all the others, to

recover the amount of labor debts of the corporation which he had been compelled after judgment and execution against him to pay. The statute authorizes a joint or several suit against all the stockholders to compel them to contribute their ratable proportion of the amount which any shareholder has thus been compelled to pay. The court below gave a joint judgment against all for such proportion of the whole amount paid as the stock held by all the defendants was of the whole capital stock.

Held, That the suit provided for by this statute is one for contribution, wherein the stockholder who has paid is entitled to recover from one or more of the others the amount he or they should ratably pay for his reimbursement, and that it does not contemplate a joint judgment by which one defendant would be charged not only for his own delinquency, but also for that of others; that the words of a statute ought to be very plain before it should be held to authorize a joint judgment on promises which were several; that what is contemplated by this statute is a recovery against each of his ratable proportion, his stock being the basis of the estimate.

Judgment reversed, with costs, and a new trial ordered.

JOHN P. CLARK vs. DETROIT LOCOMOTIVE WORKS. Error to Superior Court of Detroit.

R. A. Parker and *Ashley Pond*, for plaintiff in error.

Griffin & Dickinson, for defendant in error.

MARSTON, J.:

This action was brought by defendant in error against Clark for a balance due upon a contract for building and placing in a vessel an engine. The contract called for an engine from the same patterns as one made by them for the propeller "*Phil Sheridan*," with certain exceptions, the whole to be completed in a good, workmanlike manner, *materials and labor first-class*. Evidence was given on the defense tending to show that the contract had not been performed. The charge of the court is objected to. He charged in substance, among other things, that in determining the question, whether the work was delivered in a good and workmanlike manner, it was competent to consider the purpose of the work: that an engine which would be fit for one boat might not be for another: and so in regard to finish, the labor and materials are to be first-class in reference to the use to which the engine was to be put: that it is not to be expected that the same work will be put on one machine that might be expected for another, or the same excellence and polish; that the actual finish and the materials that would be required on a barn would not be the same that a house would require, though the contract in both cases required them to be first-class; that in considering a contract of the nature of

the one in suit, it is necessary to consider for what the engine is to be used, and the plaintiff was bound to do a good and workmanlike job, and to furnish first-class labor, materials and finish, considering the use to which the work is to be put when finished.

Held, That the legal effect of this charge was to authorize the jury to qualify the terms of the agreement as made by the parties, not by the subject matter of the contract, but by the use for which the boat was designed, though that was unknown at the time the contract was made; that the parties having contracted for first-class labor and materials, irrespective of the use to which the boat was to be put, it is not competent to so construe the contract as to render this provision inoperative; that the word "materials" as here used has reference to the material or materials used in building the engine, and the charge in effect was, that the materials used in an engine for a tug boat, or for a boat to be used exclusively in carrying freight, might be considered first-class though they would not in fact be first-class and would be unfit for an engine designed for a passenger boat, and that there might be a radical difference in the materials, workmanship and general finish in the character of the two; and that this was erroneous and misleading.

Judgment reversed, with costs, and a new trial ordered.

Estates of Deceased Persons:—Claims:—Requests to Charge:—Specific Questions of Fact:—Assignments:—Right to bring Suit:—Collateral Security:—Irrelevant Matters:—Further Instructions:—Presumptions.

CHARLES HERBSTREIT vs. WILLIAM G. BECKWITH. Case made from Kent Circuit.

Atwood & Corbett, for plaintiff.
W. L. Stoughton, for defendant.

CAMPBELL, J.:

This was an action to establish a claim against an estate, originally belonging to the widow, for advances made to her husband, for which he gave her a written acknowledgment and promise of repayment. The claim was assigned to plaintiff, who recovered below, and the administrator brings the case up for review on case made after judgment. The only really mooted question of fact seems to have been, whether the signature to the written acknowledgment and promise was genuine or a forgery. After the court had given full and correct instructions on this question, to which no exceptions were taken, he was requested to charge that the

plaintiff must prove every material allegation in the declaration, and also that the burden of proof rested on plaintiff, and he must establish by a fair preponderance of proof that the instrument was signed by deceased, but the court charged that these requests were law, but had no application to the case that he could perceive.

Held, That these requests do not point out anything that had been omitted in the charge already given, and the court below might very well regard them as useless repetitions and as raising questions which on the facts were too plain to need further instructions; that if defendant desired to call attention to the specific questions of fact more definitely, he should have pointed them out specifically; and that such a general request cannot be used as a cover for some pretended omission to which it fails to call attention.

The court also refused a request to charge "that when a chose in action is assigned by parol, it must be shown, in order to enable the assignee to maintain an action upon it, that the original owner surrendered all control over it, and made an absolute appropriation of it."

Held, That this request was incorrect, and was properly refused; that an assignment may be absolute or qualified, as the parties choose, so long as no one else is injured or defrauded; that the assignment in this case having been made as collateral security, it was sufficient to authorize the assignee to bring suit.

A request to charge, that a wife could not claim against her husband's estate for property which she brought into the household, or surrendered to him, or which they enjoyed together, was rejected as irrelevant.

Held, That the record as made up does not show that any such issue arose, or that the request was relevant, and the rejection does not appear to have been erroneous.

Complaint is made that in answer to a request by the jury for further instructions, the court told them the question for them to consider was, whether the signature to the paper writing offered in evidence was the genuine signature of decedent, and if genuine, their verdict should be for plaintiff, and if a forgery, for defendant.

Held, That the genuineness of the signature appearing to have been the only really mooted question of fact in the case, it will not be held that any error was committed, in the absence of anything to indicate on what point the jury desired further instruction; and that it is presumable the judge instructed them on the matter on which they sought guidance, and that they did not inquire beyond the point he explained.

Judgment affirmed, with costs.

Contract Relations :—Principal and Agent :—Credit :—Goods Charged to Agent :—Evidence :—Charge to the Jury :— Assignment :—Labor Demands :—Gifts.

BENJAMIN BRISCOE et al. vs. BENJAMIN F. ECKLEY. Error to Lapeer Circuit.

Gaskill & Geer, for plaintiff in error.
W. W. Stickney and *J. B. Moore*, for defendant in error.

GRAVES, J. :

Eckley recovered below for services and supplies furnished to plainitffs in error, who were jobbers on the Detroit & Bay City Railroad, and also upon several claims for labor assigned to him. Briscoe, Hill & Co. had contracted to build a portion of the road, and had sub-let a portion of the grading covered by their contract, to Howard, Halstead & Co. Eckley had entered into the service of the latter, and a number of men had begun work for them. A disagreement arose, and Eckley claims that he thereupon went into the employ of plaintiffs in error, and bought supplies in his own name at their instance, and which were consumed in their business. The assigned accounts were claimed to be partly for services rendered upon the agreement of the defendants to stand as debtors for it, and partly for service under actual employment by them, or by plaintiff at their request and for them. An objection is made that upon the whole proof the defendants below were not liable for any amount, and it is based on the fact that pay-rolls, orders and Eckley's account indicated that the services and supplies were for Howard, Halstead & Co., and showed that the credit was given to them, and not to defendants.

Held, That while this was evidence conducing to show such credit, it was not conclusive, but the question was an open one for the jury to settle on the whole evidence, and was fairly submitted to them, as was proper.

Complaint is made of the charge to the jury, concerning the transfer to Eckley of the laborers' accounts, that it made no difference whether he in fact paid anything for them or not; and it is urged that the evidence showed that he paid nothing, and that the assignments were taken simply to enable Eckley to sue, and it was not shown that he owned the demands.

Held, That there is no merit in this point; that the assignments were sufficient to pass the right of action; that it was competent for the assignors, if they pleased, to assign by way of gift, and that the fact of its being done to enable the assignee to sue could not impair the act.

Judgment affirmed, with costs.

Non-Compotes:—Deed to Wife:—Undue Influence:—Fraudulent Conveyance:—Evidence:—Husband and Wife:—Guardian:—Costs:

ANDREW J. SIKES et al. vs. ELIZABETH CRISSMAN. Appeal in Chancery from Macomb Circuit.

Hubbard & Crocker, for complainants.
D. N. Lowell and *A. B. Maynard*, for defendant.

COOLEY, Ch. J.:

This is a bill by a very aged person and his guardian to set aside a transfer of property made by him to his wife before the guardian was appointed, on the ground that the party was mentally incompetent when it was made, and that it was obtained from him by undue influence.

Held, That neither the mental incompeteney nor the undue influence is made out, and that there is nothing shown to indicate that the arrangement was unreasonable or to justify in any way the charges made against the defendant.

Decree affirmed, with costs of both courts against the guardian personally.

Mortgages:—Agreement to Assume and Pay:—Undivided Interests:—Adverse Title:—Conveyances to Cover Defects:—Equities:—Decree.

WILLIAM TAYLOR vs. JOHN WHITMORE et al. Appeal in Chancery from Barry Circuit.

John C. Sharp, for complainant.
A. D. Cadwallader, for defendant.

MARSTON, J:

This bill was filed to foreclose a mortgage given by Whitmore and wife to complainant, to secure the payment of $1,350. Whitmore and wife, subsequent to the giving of the mortgage, conveyed the property by warranty deed to defendant Cadwallader, subject to the mortgage, which the latter assumed and agreed to pay, as a part of the purchase price of the lands. The mortgage in question, as well as the deed to Cadwallader, were in form a conveyance of the entire interest in the premises, but Whitmore and wife only in fact owned an undivided one-fourth interest each, the residue belonging to heirs of one Lema Cook, deceased. Cadwallader, ascertaining his title was defective, procured quit-claim deeds from such heirs, thus perfecting his title. The decree below was in form against the entire premises, but no personal decree was taken against Cadwallader. The latter appeals from this decree,

claiming that only the interest he acquired from Whitmore and wife can be affected by these proceedings, and that the interest he acquired from the other heirs is exempt from the burthen of the mortgage.

Held, That Cadwallader, by accepting the deed under the circumstances, became personally liable to pay the mortgage, as held in *Crawford vs. Edwards*, 33 Mich., and *Miller vs. Thompson*, 34 Mich.; that as it appears clearly he obtained conveyance from the other heirs on the strength of his conveyance from Whitmore and wife, at a cost to him of only seven dollars, there is nothing inequitable in holding the entire premises subject to the payment of the mortgage, the decree in this respect being no broader than the mortgage and the deed whereby Cadwallader undertook and assumed to pay the mortgage; and that he, therefore, is not equitably entitled to complain of it.

Decree affirmed, with costs.

Fraudulent Transfers:—Evidence:—Cross-Examination:—Party to the Fraud:—Discretion of the Trial Judge:—Charge to the Jury.

AUGUSTUS JACOBSON vs. JOHN A. METZGER. Error to St. Joseph Circuit.

Upson & Thompson, for plaintiff in error.

Pealer & Andrews and *H. H. Riley*, for defendant in error.

MARSTON, J.:

Jacobson brought replevin against Metzger for certain goods seized and held by the latter as sheriff by virtue of an execution in favor of White and others against the firm of Jacobson & Co., who, it was claimed, had sold the goods to plaintiff, their brother, to defraud their creditors. Error is alleged in the rulings as to the allowance of certain questions put to the plaintiff on his cross-examination. The ground of the objection was that they were not proper on cross-examination. These questions were all asked with a view of eliciting evidence tending to show that the sale was fraudulent as against the creditors of Jacobson & Co. The plaintiff, on his direct examination, had given evidence going to show that he was entitled to recover.

Held, That the defendant had a right, on cross-examination of the plaintiff as a witness, to draw out any facts which would tend to destroy the *prima facie* case made out on his direct examination; that great latitude must be allowed in this class of cases, especially were one of the parties to the alleged fraudulent transaction is upon the stand; that in cases of fraud no definite fixed rule can be laid down, without in effect laying down a rule in many cases

for the guidance of parties about to perpetrate frauds, and that much must be left to the discretion of the trial judge; and that the parties have no legal ground for complaint here.

Objections are also urged to the charge to the jury.

Held, That the charge, taken as a whole, left the questions of fact fairly to the jury, and that no error was committed in this respect.

Judgment affirmed, with costs.

Equity Pleading and Practice:—Petition for Leave to File Bill of Review:—Foreclosures:—Excessive Decree:—Remission of Excess:—Service of Subpœna:—Clerical Error:—Guaranty of Collection:—Parties:—Personal Decree:—Contingent Liability:—Supplementary Proceedings:—Laches:—Discontinuance:—Reinstating Defendants:—New Proceedings:—Process:—Jurisdiction.

DANIEL B. JOHNSON vs. CHARLES H. SHEPARD et al. Appeal in Chancery from Saginaw Circuit.

Lucius D. Johnson, for complainant.

W. A. Clark, for defendants.

CAMPBELL, J.:

Johnson held a mortgage executed by defendant Shepard, February 10, 1868, payable in five years, with ten per cent annual interest. The defendants Woodhouse and Butler guaranteed the collection of the note. A decree by default was obtained November 30, 1874, and a sale made January 17, 1876, to complainant as purchaser, which was afterwards confirmed. Subsequently defendant Shepard and defendants Woodhouse and Butler filed separate petitions for leave to file bills of review, the former on the ground that the decree included usurious and illegal allowances for interest apparent on the face of the commissioner's report, and the latter because they were only guarantors of collection, and the decree was against them as original promisors and for an absolute liability, while they were not subject to a decree either for absolute payment or at all. On May 2, 1876, the cause was discontinued as against Woodhouse and Butler, and on June 26, 1876, the excess of interest was remitted against Shepard. The order of discontinuance was afterwards rescinded by the court on motion of the complainant. The applications for leave to file bills of review were denied, with costs, and defendants appealed.

Held, That so far as Shepard is concerned, his only complaint against the decree being that it was excessive, and against the sale, the same, with certain supposed irregularities not going to

the merits, and his petition, being filed so late as to be governed entirely by equitable considerations, ought to be denied, unless he has been really damnified, and the remission of the excess removed his only substantial grievance.

It is urged that the record did not show service of subpœna, and therefore the court had no jurisdiction; and it is claimed that on a bill of review all errors are open, whether specified or not.

Held, That this is a petition for leave to file a bill of review, which is quite a different thing from a bill of review; and that the defect relied upon is not well founded in fact, the sheriff, by a manifest clerical error, having certified that he served the subpœna a day prior to its date and issue; that a subpœna not being required to be served any particular time before the return day, it is fairly presumable in such case it was served within its life-time, and not on an impossible day.

As to the other defendants—

Held, *1*. That their obligation, being but a guaranty of collection, creates no liability against them till all other legal resources have been exhausted and have failed to produce payment, either out of the land, or out of Shepard's other property.

Held, *2*. That under the original equitable jurisdiction, there was no power to make a personal decree against the mortgagor himself, this being a statutory innovation.

Held, *3*. That under our statute, the provision for a personal decree against the mortgagor, or other person liable, contemplates that this shall be an essentially new and supplementary proceeding, and not a mere continuation of the foreclosure, and it resembles the proceeding had on the coming due of a new installment, which, though usually provided for in the original decree, is nevertheless as distinct a proceeding as a *scire facias* for further breaches of a bond; that a contingent provision for personal liability, though admissible in the original decree, does not operate as an absolute decree or final judgment till after the confirmation of the report; that the jurisdiction over persons who have become liable on the debt is not obligatory, but is only permissive.

Held, *4*. That a guarantor of collection merely, whose liability is incomplete till after all resources against his principal have been exhausted, ought not to be joined as a defendant to a foreclosure bill; but that, as no one can object to the misjoinder of defendants but those misjoined, there might be some question whether the court, where no objection is made, might not make a contingent decree against such a defendant, but it could not preclude him from a hearing before execution.

Held, *5*. That such defendants cannot be held in default, or guilty of laches, for not asking a bill of review when the proceedings to fix them finally are yet uncommenced, and it would be a

misuse of discretion to refuse to correct an evil when no one has acted or can act in reliance on it; and on appeals the appellate court is bound to exercise its own discretion upon matters brought before it.

Held, 6. That these defendants having been once dismissed, could only be brought back by the usual process, and hence that the order denying their petition, without instituting new proceedings to reinstate them as defendants, after they had thus been absolutely discharged, was without jurisdiction.

Decree of dismissal ordered as to defendants Woodhouse and Butler, with costs of both courts, and the order as to defendant Shepard's petition affirmed, with costs.

Mortgages:—Subsequent Incumbrance:—Redemption of Prior Mortgage:—Tender:—Extension of Time:—Marshalling Securities:—Parcels First Conveyed:—Priority:—Subrogation:—Apparent Cloud Upon Title:—Irregular Foreclosure:—Deposit:—Interest.

JOSEPH SAGER vs. NELSON TUPPER etal. Appeal in Chancery from Kalamazoo Circuit.

Edwards & Sherwood, for complainant.

O. T. Tuthill and *Arthur Brown*, for defendants.

CAMPBELL, J.:

Sager, as mortgagee of certain lands, filed this bill to redeem a prior mortgage. In August, 1864, Tupper and wife executed a mortgage to one Eldred for $1,100, payable in four years, with 8½ per cent. interest, and covering 160 acres of land, being four contiguous forties. The Tuppers then conveyed one of the middle forty-acre lots to their son and his wife, and afterward mortgaged to complainant the remaining 120 acres, for $1,500, payable part in one year and part in four years, with 10 per cent. interest; $450 and interest to its maturity was paid on the Eldred mortgage, and it was afterward assigned to one Clark, who, without recording his assignment, began a statutory foreclosure in Eldred's name, and bid off the whole 160 acres in one parcel for $1,026, being more than was due, but claimed by him to be the correct amount. Complainant attended the sale and protested, insisting upon a sale in parcels, and upon other assumed rights which were disregarded. Clark afterwards assigned his claim to defendant Harrison, whom complainant called upon before the redemption had expired, to make redemption on proper terms and according to his equities. Harrison refused to deal with him, asserting that he had extended the time of payment five years. Complainant thereupon deposited

thestatutory redemption money with the register of deeds, and filed this bill, with an offer to redeem on such terms as should be equitable.

Held, That it is quite plain that Harrison's extension of time was directly calculated to defraud complainant and prevent him from clearing the way for the safe foreclosure of his own mortgage.

Complainant claims that the forty acres deeded to Tupper's son and his wife should be first resorted to on the foreclosure of the Eldred mortgage, before the remainder is charged.

Held, 1. That this claim is not well founded, the conveyance of this parcel having preceded complainant's mortgage, and not having been made subject to any obligation towards the relief of the other parcels; that this parcel, therefore, must be resorted to last of all.

Held, 2. That the statutory foreclosure was void; that complainant had an absolute right, at any time after the Eldred mortgage came due, to redeem it and be subrogated to it until his own mortgage and that were both paid up, and that it was not in the power of any one to deprive him of this right; that he had also a right to get rid of the apparent cloud which the attempted foreclosure cast upon his title, and a right to know from the holders of the prior mortgage how much was due on it.

Held, 3. That if defendant had made an absolute tender, the mortgage would have been discharged.

Held, 4. That complainant having deposited more than was required to pay the mortgage, and defendants, by their course, having compelled him to leave it on deposit during the pendency of the suit, he has lost the use of it, or the interest which it would have earned, and it would be unjust to compel him to pay any interest which has accrued in the meantime.

Decree below reversed, with costs of both courts, and a new decree directed in accordance with the rights of the parties as herein established.

Equity Jurisprudence:—Primary School Land Certificates:—Assignment:—Collateral Security:—Foreclosure.

IRA W. CASE et al. vs. HUGH MCCABE. Appeal in Chancery from Livingston Circuit.

H. H. Harmon, for complainants.

D. Shields, for defendant.

GRAVES, J.:

Complainants were trading as a firm, and defendant made to Case an assignment, absolute in form, of two primary school land certificates, which they allege were assigned as collateral to an

indebtedness to the firm and to Case, which was afterward paid; that subsequently further advances were made to him by the firm, for which the assignment was to be held as collateral, as also to future advances; that on October 24, 1868, an accounting was had and a balance of $92.77 found due, for which defendant gave his due-bill at 10 per cent interest; that on January 1, 1869, another accounting was had and a further balance of $29.53 found due, for which defendant gave another due-bill with like interest; and that subsequently about $25 more was advanced; and they claim that these amounts and interest are due, and ask that the amount due may be ascertained and payment thereof decreed, and in default thereof that the interest of the defendant in the certificates may be sold to satisfy the same and costs. The defendant answered, admitting the original transaction, but denying the subsequent one. Proofs were taken, and on the final hearing the bill was dismissed, and complainant appealed.

Held, That no principle of equity or rule of law seems to preclude the relief sought, and the proofs seem to sustain the bill; that the amount which the evidence shows to be due and secured by the assignment is the amount of the two due-bills and interest and the sum of $18.86 for subsequent advances, on which five years interest should be allowed at 7 per cent.

Decree reversed, with costs of both courts, and cause remanded with directions to enter a proper decree of foreclosure and sale, giving defendant a reasonable time to make payment, and requiring a re-assignment in case of payment.

Trover:—Timber:—Standing Trees:—Sales:—Extension of time for Removal:—Title:—License:—Contracts:—Subsequent Conveyance:—Reservation of Timber.

NATHANIEL B. HASKELL et al. vs. FREDERICK L. AYRES et al. Error to Huron Circuit.

George S. Engle and *Hoyt Post*, for plaintiffs in error.
R. Winsor and *H. B. Carpenter*, for defendants in error.

COOLEY, Ch. J.:

This is trover for logs which plaintiffs (defendants in error) claimed by virtue of a purchase as standing timber of one Kingsley. The contract provided for the removal of the timber within three years, and this timber was cut after the lapse of that period. Kingsley afterwards conveyed the land to a third person, expressly reserving the timber, and he testifies that he extended indefinitely the time for taking off the timber. The plaintiffs recovered, and defendants bring error. It is urged that the original sale of the

timber by Kingsley was void because made before he had acquired title to the land.

Held, That as he acquired title to the land before the three years expired, that would be sufficient to validate the sale of the timber; that he could not then dispute it, nor could any third person.

It is insisted that his extensions of time to take off the growing timber were invalid because not in writing as required by the statute of frauds.

Held, That whether valid or not originally, they would be good as licenses so far as they were acted upon, and Kingsley testifies that for all the timber cut he received payment.

It is claimed that the agreement itself was ineffectual to pass title to any particular timber, because the sale was not of all the timber on the land, but only of the merchantable timber, so that some action would be requisite to determine what was and what was not covered by the sale.

Held, That as the sale was of all the merchantable timber, it took effect at once, and only a question of fact would be open as to what was and what was not merchantable.

It is insisted that Kingsley had no authority thus to extend the time of taking off the timber; his reservation of it by his deed being only for the purpose of protecting his contract.

Held, That his deed does not show this, the reservation being absolute; that while there must undoubtedly be some limit to the right of Kingsley thus to extend the time after he had parted with the title to the land, and he could not do so indefinitely to the prejudice of an owner who might desire to put the land to use, yet it does not appear here that the owner of the land ever objected, or ever notified the owner of the timber to remove it; and that no error was committed in this regard.

Judgment affirmed, with costs.

Married Women:—Mortgages:—Homestead:—Wife's Acknowledgment:—Presence of Husband:—Estoppel:—Fraud.

STEWARD M. NORTON et al. vs. RACHAEL P. NICHOLS. Appeal in Chancery from Ionia Circuit.

L. B. Soule, for complainants.

Wells & Morse and *M. E. Crofoot*, for defendant.

CAMPBELL, J.:

This bill is filed to set aside a mortgage on Norton's homestead, on the ground that his wife did not legally acknowledge it. The bill does not dispute the consideration of the mortgage, nor is its fairness in any manner impeached, but the whole ground for

assailing it is the technical claim that the acknowledgment of the wife was taken in the husband's presence, which is unlawful. Mrs. Norton knew the purport of the mortgage, and that the mortgagee relied on it as valid, and that it was valid on its face, but she made no objection and took no steps to repudiate it until after proceedings had been commenced to foreclose it.

Held, *1.* That whatever may be the rule concerning the formalities needed to bind married women, there can be no doubt they may be estopped by their deliberate conduct as well as any one else; and that the circumstances of this case show that defendant would be grossly defrauded by complainant's course if this mortgage was allowed to be set aside.

Held, *2.* That if a conveyance can ever be set aside for a mere omission which is made out by contradicting an official act, where there has been no fault in the claimant, it certainly will not be where the party complaining has not only consented to the act, but has never taken any course to repudiate it, or to save the grantee from the effects of confidence in its validity.

Decree reversed, and bill dismissed, with costs of both courts.

Divorce:—Temporary Alimony:—Attachment:—Contempt Proceedings:—Appeals:—Final Order:—Practice on Appeals: Discretion:—Order for Payment of Money:—Disobedience:—Punishment:—Remedy:—Execution:—Excuse for Non-Payment:—Contumacious Evasion:—Injunction.

ANGELINE HAINES vs. CHARLES H. HAINES. Appeal in Chancery from Kalamazoo Circuit.

Edwards & Sherwood, for complainant.

Arthur Brown, for defendant.

CAMPBELL, J.:

This is a divorce suit. The court below, after full hearing, on Nov. 29, 1875, ordered defendant to make payment, on complainant's behalf, of $50 solicitor's fee, $20 for securing attendance of witnesses, and $20 a month temporary alimony. On June 13, 1876, after examination on interrogatories, and the hearing of proofs, defendant was adjudged guilty of contempt, and ordered to pay forthwith the arrears of $210, and a fine of $100, and in default to stand committed for four months, unless he should sooner pay the same. He appeals from that order.

It is first objected that an appeal will not lie.

Held, That it has already been decided otherwise, that such an order is a final one, and appealable.

Same controversy is also made as to the extent of the jurisdiction on appeal.

Held, That in all appeals the matter is heard in the appellate court as if it had not been heard before, and the order made is such as should have been made below.

It is claimed the order for alimony is invalid, and if valid, that it should have been enforced by a different remedy; also, that defendant had not the means to make the payments, and should be excused on that account, as not a willful offender.

Held, 1. That where the order violated was made without jurisdiction, it has no force, and no legal wrong is done by disobeying it; but if it be a valid order, the question of punishment for disobedience will depend on whether the conduct of the offender is intentionally and willfully contumacious, or qualified by circumstances fairly exempting him from serious blame.

Held, 2. That the right to grant temporary alimony has been recognized without question in all divorce suits where the circumstances required it; but that the allowances should be confined to what may be reasonably regarded as necessary in each case; that the power being made to rest in discretion, and the order itself not being appealable, it will not be reviewed collaterally in proceedings for contempt, at least not except in a very plain case of abuse, which is not made out here.

It is urged that the remedy for non-payment should be by execution.

Held. That the process of contempt to enforce civil remedies is one of those extreme resorts which can be justified only in the absence of any other adequate remedy; that payment of money can only be enforced by attachment "where by law execution cannot be awarded for the collection of such sum;" but that the nature and purposes of allowances to carry on litigation would not allow them to depend for enforcement on executions, and they do not come within the language or the equity of the statutory provision covering costs.

As to the question whether the defendant acted contumaciously, it appears he did not make payment; that when the original order was made he had considerable property, and when the suit was commenced, still more; and he insists that the injunction which issued tied his hands so that he could not raise money.

Held, 1. That this pretext amounts to nothing, as it is evident it was fraud, and not poverty, that prevented the payment, and that the defense to the motion was evasive and without truth.

Held, 2. That the provision of the order which imposes a fine on defendant is unauthorized, as the statute (Comp. L., sec. 5,709) expressly provides that in such cases the order for payment of money to the injured party shall stand "instead of a fine."

Order reversed and vacated as to the separate fine imposed, and otherwise affirmed, with costs.

Covenants:—Seizin:—Quiet Enjoyment:—Declaration:—Warranty of Title:—Variance:—Clerical Errors:—Burden of Proof:—Breach of Covenant:—Evidence:—Title Paramount:—Bill to Quiet Title:—Decree:—Presumptions.

HORATIO N. PECK vs. WILLIAM O. HOUGHTALING. Case made from Kent Circuit.

Godwin & Reeves, for plaintiff.
Joslin & Kennedy, for defendant.

GRAVES, J.:

This was an action for breach of covenants in a deed given by Houghtaling to Peck, in 1855. The deed contained the common covenants of seizin, of quiet enjoyment, and against encumbrances, and no others. The declaration counted upon breaches of covenant of seizin and of warranty of title.

Held, That no notice having been taken of the variance in the covenant averred (to warrant and defend the title), and that proved (of quiet enjoyment), the question is not material here, but there seems to be a conflict of authorities whether or not there is any real difference in the operation of these covenants, and it is questionable whether it is admissible under an averment of one to introduce the other in evidence, and that the safer way is to plead the covenant according to its form.

It is objected that the covenant in question was defective because the word "he" was omitted in the blank before the words "will forever warrant," etc.

Held, That this was manifestly a mere clerical error, which corrected itself, and that justice ought not to stumble at straws.

It is contended that in this action for covenant broken, when the plaintiff has proved the covenant, the burden of proof is cast upon the defendant to make out that he has performed his covenant.

Held, That this point is ruled otherwise in *Ingalls v. Eaton*, 25 Mich., 32, and that the party alleging breach of covenants of title must prove both the covenants and the breach.

The only evidence of breach introduced was a chancery suit and decree in favor of one Hewitt and against Peck. The bill was one to quiet title, the lands being wild and vacant, and Hewitt having entered into possession before filing his bill. The decree in question only adjudged that defendant "has" no right, title or interest in the lands in question, and that complainant "has" a good, sure and perfect title thereto in fee simple, without showing whence he deduced his title or when he acquired it, or that in 1855, the date of the deed in question, he had, or claimed to have, any title.

Held, 1. That though this decree does not, as is customary, declare title in complainant at the time of the institution of the suit, yet such must be taken to be the meaning of it; that there being nothing in it to show that Hewitt's title originated prior to the giving of the deed in question, it is not inconsistent with the covenants therein.

Held, 2. That the entry of Hewitt, and his exclusion of Peck, amounted to nothing as proof of breach of covenant for quiet enjoyment, unless the entry and exclusion were under title paramount, and in the absence of any showing that Hewitt's title is earlier in origin than Houghtaling's deed to Peck, it is not shown that Houghtaling was not seized in fee at that time; that the facts found in this case, therefore, do not show a breach of either the covenant of seizin or the covenant of quiet enjoyment, and judgment should have been given for defendant.

Judgment ordered accordingly.

Attachment:—Bond to Release Property:—Defects in Affidavit for Attachment:—Waiver:—Transfer of Causes:—Stipulation:—Jurisdiction of Persons:—Joint Defendants:—One Defendant not Served:—Personal Liability:—Measure of Recovery on such Bond:—Amount of Judgment:—Value of Goods Released:—Condition of Bond.

CAROLINE A. GOEBEL, Administratrix, vs. WILLIAM P. STEVENSON et al. Case made from Kent Circuit.

Joslin & Kennedy, for plaintiff.
Norris & Uhl, for defendants.

GRAVES, J.:

This is an action upon a bond to release chattels belonging to the defendant Stevenson, from an attachment issued in a suit instituted by the plaintiff. The chattels were appraised at $2,625.70. A small portion was sold by order of the court before the bond was given, and brought $88.52. The bond was in the penalty of $9,090, recited the institution of the attachment suit and the levy of the writ, and that Stevenson was desirous of obtaining the deliver of the property to him by the sheriff in pursuance of the statute, and was conditioned for the return of the goods and chattels to the sheriff to satisfy any judgment that should be rendered against the defendant, or in default of returning the same, for the payment of such judgment as should be recovered against the defendant, within sixty days after such judgment. The amount specified as due in the affidavit for the writ is just one-half the penalty of this bond. On delivery of this bond to the sheriff, the

attached property was turned over to Stevenson. Judgment passed in the attachment suit for the plaintiff for the sum of $4,465 damages, and $173.31 costs. The case was taken to the Supreme Court on case made, and there affirmed, with costs in favor of plaintiff, taxed at $44. Execution having issued, demand was made of the obligors on said bond for the goods seized on the attachment, and refused, and the execution was returned unsatisfied. A second execution was issued, a second demand made and refused, and execution returned *nulla bona*. Payment of the judgment and costs was then demanded of these several defendants, who declined to pay more than the value of the goods seized and released, and interest thereon. Thereupon the plaintiff procured from the sheriff an assignment of said bond, and instituted the present suit. Personal service was had on defendants Innes and Aldrich, but no return was made of service upon Stevenson. After appearance and plea, the cause was transferred from the Kent Circuit, where it originated, to the Superior Court of Grand Rapids, by stipulation between the parties. Stevenson did not appear in the cause, nor take part in the stipulation. The sheriff's return of service was afterwards, on motion, amended so as to show search for and failure to find Stevenson, and that he was not a resident of this State, but resided in Indiana. The cause was tried by the court without a jury, and written findings of fact and law made and filed. Judgment was rendered for plaintiff for the amount of the appraised value of the goods seized on the attachment and released by the bond, with interest. The plaintiff brings the cause up on case made. The defendants now urge certain defects in the affidavit for attachment, as invalidating the suit.

Held, That the writ having been personally served, and no objection having been made in that cause to the affidavit, and the defendant Stevenson having, so far as appears, voluntarily delivered the bond in suit, and thereupon obtained on the strength of it a release of his goods as from the seizure of a valid writ, and the stipulation for a transfer of the cause having expressly stated that the attachment suit was commenced in due form of law, the question whether the affidavit was by itself good or bad, is not now open to either of these defendants.

Defendants also urge that the proceedings for transferring this suit to the Superior Court conferred no jurisdiction on that tribunal, for the reason that Stevenson was not represented.

Held, That the actual parties having consented to the transfer by voluntary agreement, which is of record, and both courts having acquiesced, and the Superior Court assumed to act, and these defendants there appeared and gone to trial on the merits, this objection is without force; that the Superior Court acquired all the jurisdiction which the Circuit Court previously held; that defendants Aldrich and Innes are bound by their agreement and

cannot be heard to complain, while Stevenson makes no complaint and cannot possibly be prejudiced, as he is not personally bound by the judgment.

The main question relates to the measure of recovery.

Held, That the statute, Comp. L., sec. 6410, gives a defendant in attachment who seeks a release of his property an election to give security by bond for the payment of the judgment, or by bond for the production of the property to satisfy the judgment; that the bond in suit is peculiar in that it contains in alternate conditions substantially the requirements of both these statutory bonds; but that the obligors having declined to perform either of the conditions actually recited in the bond cannot now reasonably be allowed to discharge their obligation by performance of a third act not expressed at all in the bond; that the first alternative in the condition of the bond, if of any force, was a provision in ease of the obligors, and if they would insist upon its sufficiency to discharge the bond it was for them to perform it, having failed in this they have left it as an impertinent provision, and cannot now insist that the second alternative, which is strictly applicable to the kind of bond here evidently intended, may be discharged by doing something not provided anywhere and not applicable to the bond; and that the plaintiff is entitled to recover the amount of the judgment and costs, with interest, less the proceeds of sale of the perishable property, and also the costs on the affirmance of such judgment in the supreme court, with interest.

Judgment reversed, with costs, and new judgment directed to be entered on the finding.

Police Force of East Saginaw:—Fees for Pursuit and Apprehension of Criminals:—Offenses Committed in City:—Claims Against County:—Statute Construed:—Mandamus.

THE PEOPLE ex. rel. THE POLICE COMMISSIONERS OF EAST SAGINAW vs. THE SUPERVISORS OF SAGINAW COUNTY. Application for mandamus.

T. E. Tarsney, for relators.

Gaylord & Hanchett, for respondents.

COOLEY, CH. J.:

This an application to require respondents to audit bills for the statutory fees of members of the Police Force of East Saginaw, for services as officers in the pursuit and apprehension of criminals accused of offenses committed within the city.

Held That while the construction of the statute in question is not very clear, it does not require the respondents to audit such claims as are here involved.

Writ denied, but without costs.

Contracts : — Condition : — Non-Performance : — Pleading : — Recoupment:—Failure of Consideration.

JAMES N. SHERWOOD vs. HAMDEN A. HECOX. Error to Allegan Circuit.

Philip Padgham, for plaintiff in error.
Severens, Boudeman & Turner, for defendant in error.

GRAVES, J.:

This suit was brought by Hecox, upon an instrument in writing signed by Sherwood, as an order for a marsh harvester. It was a printed blank form, and purported to order a machine to be shipped to Sherwood, at Kalamazoo, on or before June 15th, and stated that on its arrival there Sherwood would give his note for $200, to fall due in October, 1875, with interest at ten per cent., in case the machine were answerable to the under-written warranty, and, if not, would re-deliver it at Kalamazoo, at his own cost; and its specifications under the head of warranty implied that the machine should be subjected to actual test in the harvest field, and that if it failed, notice was to be given to Hecox. The machine was delivered at Sherwood's residence, instead of at Kalamazoo, but no note was given or required. Sherwood tested the machine and found it a failure, notified Hecox, and boxed up the machine as when delivered to him, and set it one side. Hecox came on, and Sherwood offered to deliver the machine at Kalamazoo, but Hecox refused, and demanded the note, claiming that he was entitled to it whether the machine was good or bad. Sherwood refused to give the note, and Hecox brought this suit during the time the note was to run, to recover his damages for its not being given. No notice of recoupment was attached to the plea. The court below ruled that the defendant was required to give the note, and that if he had any defense it was by way of recoupment, and having failed to give notice of that, plaintiff was entitled to a verdict for the amount of the note, and verdict was directed and judgment rendered accordingly.

Held, That this ruling was erroneous; that upon a fair view of the whole transaction it seems to have been understood that Sherwood should not be bound to pay for the machine if it failed to perform, and the undisputed facts show a substantial failure; that the giving of the note having been deferred until after the trial of the machine and its failure, and Hecox having waived re-delivery at Kalamazoo, Sherwood was not bound to keep the machine and pay for it, and hence was not bound to give security to pay for it; that it not being such a machine as he had agreed to give his note for, there was no consideration for the note.

Judgment reversed, with costs of both courts, and a new trial ordered.

Estates of Deceased Persons:—Claims:—Promise Executed and Delivered in Lifetime to Pay Money After Death: Consideration:—Testamentary Disposition:—Wills.

SALMONI REITHMEIR vs. WILLIAM G. BECKWITH. Case made from Kent Circuit.

Thompson & Pratt, for claimant.
W. L. Stoughton, for respondent.

MARSTON, J.:

The proceedings in the court below were on appeal from the decision of commissioners on claims against the estate of John Reithmeir. The claimant was widow of the deceased, and her claim was upon the following instrument: "For value received I promise to pay to Salomi Reithmeir, or order, the sum of $500, without interest, said sum to be payable out of my estate, in thirty days after my death, said sum being intended as a gift to said Salmoni Reithmeir, over and above all claims she may have against my estate, either as my widow or under any will and testament heretofore or hereafter made by me." This was signed by the deceased, and was executed and delivered to the claimant in the lifetime of decedent, in settlement and compromise of a divorce suit brought by her, and in consideration of her returning to live with him. The commissioners disallowed the claim, but in the circuit it was allowed.

Held, That the instrument in question was something more than a mere promise to make a gift—it was an absolute agreement given upon a good and valuable consideration, which, after delivery, was beyond recall by the maker; that its being made payable after his death did not make it a testamentary disposition to be governed by our statutes relative to wills; and that the allowance of the claim was proper upon the findings of fact.

Judgment affirmed, with costs.

Transfer of Causes:—Act of Congress of 1875:—Application:—Former Trials and Judgments:—Statute Construed.

WALTER CRANE vs. EDWIN REEDER et al: WALTER CRANE vs. THOMAS REEDER et al. Error to Wayne Circuit.

Douglass & Bowen, for plaintiff in error.
D. B. & H. M. Duffield, for defendants in error.

GRAVES, J.:

November 19th, 1875, petitions and bonds were presented by defendants in each of these cases, to the court below, for the removal of the same to the federal court, under the Act of Congress of March 3d, 1875, and the court below accepted the peti-

tions and bonds, and approved the same. The plaintiff now asks a reversal of this action on writs of error.

Held, 1. That the first named cause, having been tried three times upon the merits in the court below, and three times examined in this court on different writs of error brought on judgments rendered in the court below prior to the passage of the act in question, was not removable under said act, and that the court erred in holding the contrary.

Held, 2. That the second cause, not having been tried at all when said act was passed, and the application for its removal having been made at the first term held after the act and anterior to trial, it was subject to removal, and the court below was correct in so holding.

Fraudulent Transfers:—Case Ruled by Previous Decision.

MARGARET PATTERSON vs. DAVID M. FISH. Appeal in Chancery from Benzie Circuit.

E. S. Pratt, for complainant.
Fowler & Harley, for defendant.

PER CURIAM:

Held, That this case is ruled by *Hill vs. Bowman*, decided at this term.

Decree reversed, with costs, and cause remanded, with directions that the demurrer be overruled, and defendant have leave to answer within twenty days after service upon him of a copy of the order.

Divorce:—Habitual Drunkard:—Proofs.

ANN MAGAHAY vs. ROBERT MAGAHAY. Appeal in Chancery from St. Clair Circuit.

Brown & Farrand, for complainant.
Mitchell & Avery, for defendant.

PER CURIAM:

This is a bill for divorce, on the ground that the defendant has become an habitual drunkard.

Held, That the evidence shows defendant has the habit of indulging in intoxicating liquors so firmly fixed that he becomes intoxicated as often as the temptation is presented by his being in the vicinity where liquors are sold; and that this is sufficient to make him out an habitual drunkard within the meaning of the statute.

Decree reversed, and decree of divorce directed as prayed.

Contempt Proceedings:—Decree:—Refusal to Execute Deed:—Deed not Presented for Execution:—Amendment of Decree Without Notice.

SIDNEY BERRY vs. WILLIAM P. INNES. Appeal in Chancery from Kent Circuit.

Toggart, Simonds & Fletcher, for complainant.
James A. Rogers and *L. D. Norris*, for defendant Innes.

PER CURIAM:

This is an appeal from an order adjudging the defendant guilty of contempt for disobedience of a decree requiring him to execute a deed.

Held, That the order appealed from was unwarranted; that the defendant could not be guilty of contempt under the circumstances until a deed had been presented to him for execution and he had refused to execute it; that he was not bound at his peril to prepare and execute such a deed as the decree called for.

The decree was amended without notice to the defendant.

Held, That the amendment of the decree without notice was improper, and though the amendment made could not injure this defendant, yet as the decree itself appears in some particulars not to be warranted by the case made, the defendant should be allowed to take advantage of the error.

Order reversed, with costs, and leave given to file a bill of review.

Mortgages:—Married Women:—Mistake:—Imposition:—Fraud:—Proofs:—Husband:—Execution:—Acknowledgment:—Irregularity:—Redemption.

MENNA FRICKEE vs. ANDREAS DONNER. Appeal in Chancery from Berrien Circuit.

Muzzy & Beaver, for complainant.
Edward Bacon, for defendant.

GRAVES, J.:

This is a bill to set aside statutory forclosure proceedings and to cancel the mortgage on the ground that it was executed by the complainant to secure a debt of her husband, and was, by imposition and through mistake, made to cover a different lot than the complainant supposed she was mortgaging, the lot mortgaged being a homestead and the other a vacant lot.

Held, 1. That the weight of evidence is against the complainant's charge that she executed the mortgage either under a mistake or imposition.

Held, 2. That the connection of the husband with the mortgage is of no consequence, the wife owning the property and being able to mortgage it as though she were sole; that whatever irregularities there may have been in the execution or acknowledgment by the husband cannot impair the security.

Held, 3. That the claim that the defendant, as assignee of the mortgage, gave indulgence to the husband, whose debt the mortgage secured, is not supported by the evidence, which fails to make out a binding agreement for an extension of time.

Held, 4. That the mortgage is good in equity as against the complainant, but that under the circumstances she ought to have leave to redeem within a reasonable time, should she desire so to do.

Decree below reversed, with costs of both courts, and cause remanded, with directions to enter a decree for redemption and for such further proceedings as may be required.

Sewer Taxes:—Assessments:—Superficial Area:—Values:—Legislative Power:—Equality of Burden:—Basis of Assessment:—Increase of Market Value:—Lands not Specifically Benefited:—Agricultural Lands:—City Lots:—Arbitrary standard:—Notice:—Right to be heard:—Equity Jurisprudence:—Lien Upon Lands:—Cloud upon Title:—Parties.

NAHUM E. THOMAS et al. vs. JAMES GAIN. Appeal in Chancery from St. Clair Circuit.

C. I. Walker, for complainants.
W. T. Mitchell, for defendant.

COOLEY, Ch. J.:

This is a bill to restrain the collection of a sewer tax in the city of Port Huron. The principal question is, whether it is competent to provide by law that sewer taxes in a city shall be assessed upon the lots and lands benefited in proportion to their superficial area, irrespective of proportionate benefits.

Held, That the proper method of levying assessments for sewers has not been much discussed by the courts, but in England they have generally been laid in proportion to benefits received, estimated according to the yearly value of the lands within the district; and in this country assessments for sewers, and also for drains, have generally been levied upon an estimate of special benefits, and the assessment of sewer taxes by the superficial area is quite unusual; that if the assessment be a tax, in the ordinary sense, it must, under our constitution, be assessed by value, but if not, it must be apportioned on some other basis, but it does not fol-

low that it may be apportioned on any basis whatsoever which the legislature may see fit to prescribe; that an assessment levied without regard to actual or probable benefits is unlawful, as constituting an attempt to appropriate private property to public uses, and that the rule prescribed must at least be one which it is legally possible may be just and equal as between the parties assessed.

The only discretion which the act in question here allows to the common council, as an assessing board, is in determining what lots and lands are benefited by the improvement, and when that determination is made, the rule of apportionment is fixed, and it must be made according to the area. It is not required that the lands shall lie contiguous to each other, or that the benefits to be taken into the account shall be only the direct benefits to the land; and there is nothing in the act to preclude the taxation of lots remote from the sewer if their market value, actual or speculative, is increased by means of it.

Held, *1.* That while this increase of value might be a reason for general taxation for sewer purposes, it would not warrant an apportionment by superficial area, since that, under no circumstances, could be just, unless limited to lands directly and peculiarly benefited; that, moreover, this act makes no provision by which parties assessed may of right drain into the sewer, so as to be enabled to reap the benefits they ought to derive from the expenditure, and makes no distinction between property actually occupied, or capable of being occupied, for city purposes and that of an agricultural nature, upon which such a burden would fall with great severity and injustice, nor does it confine the assessment to lands upon the street in which the sewer is laid, so that a lot is liable to be assessed several times in different districts for different sewers, provided that in the opinion of the common council it is benefited by each of them; and while this might not be unjust if each assessment was laid upon an estimate of actual benefits, it is manifest that it would be when levied by an arbitrary standard requiring the burden to be laid upon lands far from the sewer, and only slightly benefited, equally with those fronting upon it and greatly benefited; it is not, therefore, legally possible that such an apportionment of the cost of sewers can be just or equal, or in proportion to benefits, and that the assessment in question cannot be sustained.

Held, *2.* That parties whose property is to be taken under summary tax proceedings are entitled as of right to be heard at some stage in the proceedings before the tax shall become an established charge against them or their property.

The bill in this case complains that the city marshal is about to proceed in the collection of the assessment from the personal property of the complainants; and an objection is raised to the jurisdiction.

Held, That had the bill been demurred to on this ground, the objection would have been fatal; but that this case differs from

Youngblood vs. Sexton, in that the tax is one levied upon real estate, and which by the statute is made a lien; and that the case is consequently a proper one for a bill to remove a cloud from the title.

The city marshal alone is made defendant to this bill.

Held, That the city should have been made a party, as the cloud upon the title would not be removed by merely enjoining the action of the marshal on his tax warrant; but that this objection, not having been seasonably made, may be obviated by amendment at the hearing, and this course will be permitted here.

Cause remanded, with leave to complainants to amend by adding the city as a formal party, and with directions to enter final decree for complainants when the amendment is made, neither party to recover costs.

Highways:—Mill Races:—Bridges:—Liability of Mill Owners:—Statute Construed:—President and Trustees of Kalamazoo:—Commissioners of Highways:—Charter:—Statutory Action for Failure to Bridge Mill Race:—Parties:—Size of Bridge:—Retrospective Construction:—Duty:—Remedy:—Evidence:—Immaterial Questions.

DAVID B. MERRILL et al. vs. THE PRESIDENT AND TRUSTEES OF KALAMAZOO, as Commissioners of Highways. Error to Kalamazoo Circuit.

Severens, Boudeman & Turner, for plaintiffs in error.
Edwards & Sherwood, for defendants in error.

COOLEY, Ch. J.:

The action below was brought to recover the expense of constructing a bridge on Portage street in Kalamazoo, over a race cut about the year 1840, to conduct the water to the mill owned and operated by defendants (plaintiffs in error). The race appears to have been bridged from the first, and the bridge in question was constructed by the village authorities in the place of one which they claimed had become unfit for use. Before constructing it they had notified defendants to do so, furnishing them with the specifications, which were for a bridge thirty feet in width; but this notice was disregarded. Judgment was recovered below for the full cost of the bridge.

It is objected that the suit should have been brought in the corporate name of the village.

Held, *1.* That while such is undoubtedly the general rule, it is competent, by statute, to make exceptions, and that for this case one has been made; that the village charter confers on the president

and trustees the powers and duties of commissioners of highways, and thereby draws a distinction between the board in its legislative capacity and the members of the board acting *ex officio* in another capacity, and makes their title of office different in the two cases; and that among the powers possessed by highway commissioners is that of bringing suit in their name of office against parties neglecting to maintain and build bridges over their mill races crossing highways.

Held, 2. That the present suit, however, is misconceived, the powers in this behalf conferred being given to the president and trustees as individual officers, and not as a corporate body, and that the suit should have been brought in their name of office as commissioners, and not in their name as a common council, which for this purpose they are not; but that as this was only a misnomer, an amendment might have been allowed to cure it.

It is urged that the action cannot be sustained, because the power over bridges was conferred upon the board, to be exercised by ordinance, and no ordinance applicable to the case had been adopted.

Held, That the provision of the charter relied upon as the basis of this objection applies to the highways, bridges, etc., which are to be constructed and kept in repair by the village itself, through the exercise of the taxing power, and does not necessarily embrace the case of bridges which it is the duty of private persons, as proprietors of mills, to construct, and the construction of which is supposed to be sufficiently provided for by general law; and that such charters are to be construed as not designed to encroach upon the general law any further than the plain terms show an intent to do so.

It is insisted that the defendants were under no obligation to construct a bridge of the dimensions of the one in controversy.

Held, That this point is well taken; that the statute (Comp. L., secs. 1309-10) requires the mill owners to construct "a good and sufficient bridge or bridges, not less than fourteen feet in width," and empowers the commissioners to build at their expense in case they "shall refuse or neglect to make such bridges;" and that the defendants would have performed their legal duty under this statute had they constructed a suitable bridge of the width of fourteen feet, and, failing in that, the commissioners are only to discharge the unperformed duty at their expense.

It is urged that the statute in question is not applicable to this case, as it was passed in 1855, some fifteen years after the race was cut; and that statutes are not to receive a retrospective construction unless their language plainly requires it.

Held, That applying the statute to this case is not giving it a retrospective operation, it being the duty of mill owners to bridge their races where they cross highways, independent of any statute, so that the statute imposes no new duty, but merely pro-

vides an efficient remedy for a failure to perform a duty which existed before.

Several questions are raised on the admission of evidence to prove the existence of the road before the race was constructed. It appears to have been claimed that the road had become a public way, by use or dedication, before May, 1833, and in that month the township commissioners caused it to be surveyed and recorded under the territorial laws as an existing road. It is claimed such a record would not establish a road.

Held, That though it would not establish a road, it would become a permanent record of the line when the road was established by other evidence.

There was some controversy over the question of an abandonment and re-establishment of the road.

Held, That the road not having been abandoned at the point where it crossed the race, the questions raised as to variations in the line at other points are immaterial, as such variations could not preclude the public right to insist upon the public way at this point, or affect in any way or manner the duty of defendants to keep the race bridged for public use.

The court declined to charge as requested, that if at the time the race was dug there was no traveled road within the limits of the present highway at the point where the race crosses the road, then the plaintiffs cannot recover.

Held, That it is somewhat doubtful if there was any evidence to warrant such a charge, but that if there was, the request should have been given.

CAMPBELL, J.:

Held, 1. That the statutory action for the non-erection of bridges over mill races does not apply in the village of Kalamazoo, the amended charter regulating the powers over roads, bridges and mill races being inconsistent with and superseding the statute.

Held, 2. That if the statutory obligation existed and could be enforced by action, it does not require a bridge beyond fourteen feet in width, nor one beyond what is reasonably required, and that the establishment of a wider one cannot render the mill owner liable to pay for it.

Judgment reversed, with costs, and a new trial ordered.

Scire Facias:—Foreign County:—Statutes Construed:—Mandamus.

THE PEOPLE ex rel. CALVIN C. BURT vs. THE JUDGE OF THE JACKSON CIRCUIT. Application for mandamus.

C. C. Burt and *Hoyt Post*, for relator.

No counsel appeared for respondent.

PER CURIAM:

This was an application to require the respondent to allow a

writ of *scire facias* to issue against a defendant residing in another county, addressed to the sheriff of such foreign county.

Held, That under the statute writs of *scire facias* cannot be issued to other counties than that in which the court sits; that the statute (Comp. L., sec. 3748), as to original process, does not apply.

Writ denied.

Replevin:— Title:— Delivery:— Executory Contract:— Oats in Bulk:—Measurement:— Separation:— Identification.

DAVID CRAPO VS. GOTLOB SEYBOLD. Error to Ionia Circuit.

William O. Webster, for plaintiff in error.

Sessions & Strickland, for defendant in error.

MARSTON, J.:

This was replevin for some wheat. In the fall of 1874, Thomas H. Crapo sowed about sixteen acres of wheat on shares upon lands of third parties. In November of that year, he made an oral arrangement with Seybold to sell Seybold his interest in the wheat for 100 bushels of oats, Seybold to deliver the oats at that time, or store them for Crapo till he should want to take them away. There was evidence tending to show that the final arrangement was, that the oats should remain in the bin in Seybold's barn, mixed with other oats, in all 321 bushels; that Crapo never saw the oats, and the 100 bushels were never measured out or separated from the others; that on November 17th an agreement was made that Seybold and one Van Sickline were on the next day to draw the oats to Ionia to sell them, the proceeds to be paid over to Crapo; that afterwards, on the same day, a levy was made on the oats by one of Thomas Crapo's creditors, and still later on that day Crapo notified Seybold he need not draw the oats the next day, as he had sold the wheat to his father, the plaintiff in error. There was also evidence that Crapo before the levy had told one of the parties on whose land the wheat was growing, that he had sold his interest to Seybold, who would cary out his contract as to cutting and shocking the wheat; also, that he had endeavored to sell the oats to other parties. On the part of defendant there was evidence that no agreement had in fact been made, but that it was left optional with Crapo to sell the wheat to any one else if he could. In the harvest of 1875, both Seybold and David Crapo commenced cutting the wheat, each forbidding the other. Seybold left the field, and Crapo finished cutting and shocking the wheat, and Seybold, while it was in the shock and undivided, replevied what he claimed was his interest in the wheat under his agreement with Thomas H. Crapo.

Held, That the evidence fails to show such an agreement as would pass title to either the oats or the wheat, the agreement

being an executory one, requiring further action by both parties to carry it out in order to perfect the sale; that the evident intent of the parties was, that upon delivery of the oats, or the proceeds of the sale thereof, the title to the wheat was to pass, but not before, and that the title to the oats under the circumstance would not pass to Crapo until they were measured or separated and identified in some way, and Crapo cannot be said to have acquired title to any particular hundred bushels of the whole bulk in the bin of oats, which could have been levied upon and sold as his property.

Judgment reversed, with costs, and a new trial ordered.

Defective Deeds:—Registry:—Curative Act of 1861:—Notice.

JOHN HEALY vs. ALEXANDER WORTH. Error to Oakland Circuit.

A. C. Baldwin for plaintiff in error.

J. E. Sawyer and *C. & W. N. Draper*, for defendant in error.

MARSTON, J.:

The question raised in this case is whether the curative act of 1861, as to the effect of the record of defective deeds, applies to a deed executed in New York in 1836, and recorded in 1846, where no clerk's certificate of due execution, according to the laws of New York, was annexed to the deed. The statute in question, referring to defects "in any statutory requisite in the sealing, signing, attestation, acknowledgment or certificate of acknowledgement" of any deed, provides that "when any such defective instrument has been or shall hereafter be recorded," etc., "such record shall hereafter operate as legal notice of all the rights secured by such instrument." In this case the proper certificate was annexed to the deed before the trial.

Held, That this certificate removed any defects which previously existed in the deed, and no further question could arise but that it had in 1839 been executed according to the laws of New York.

It is argued that the deed when recorded in 1846, having no certificate whatever attached, the entire want of a certificate is not cured by the statute, which operates only to cure an imperfect certificate.

Held, That this is too narrow a construction to put upon a remedial statute designed to cure defective instruments; that the deed in question was a "defective instrument" within the meaning of the statute, and that all like defects are clearly within the letter and spirit of the statute; and that the record of the defective deed became, after the passage of the act of 1861, constructive notice to all parties of the actual rights of the grantee under such deed.

Judgment reversed, and a new trial ordered.

Probate Courts:—Allowances to Widow:—Appeal:—Order Reversed in the Circuit:—Motion to Set Order Aside:—Stay of Proceedings:—Delays.

THE PEOPLE ex rel. LILLIE A. CURTIS vs. THE PROBATE JUDGE OF CASS COUNTY. Application for mandamus.

J. V. Rogers, for relator.
S. Tryon, for respondent.

COOLEY, Ch. J.:

The relator having filed her application for the setting off to her as widow the statutory allowances, the probate judge denied the application. On appeal, his action was reversed. When the order of the circuit judge was certified to the probate judge, he declined to make the allowances, the reason assigned being, that a motion had been made in the circuit to set aside the order.

Held, That after the order of the circuit court was so certified to the probate judge, it became the duty of the latter to proceed at once, when applied to, to make the allowances, and that the subsequent motion made in the circuit is no stay of proceedings, and the statute contemplates that there shall be no delay in setting apart these allowances, except such as is unavoidable.

Mandamus granted.

Mandamus:—Declaration:—Amendments:—Cause of Action Barred by Statute of Limitation.

THE PEOPLE ex rel. THE MICHIGAN CENTRAL R. R. COMPANY vs. THE JUDGE OF THE KALAMAZOO CIRCUIT. Application for mandamus.

Edwards & Sherwood, for relator.
Severens, Boudeman & Turner, for respondent.

PER CURIAM:

This is an application to require respondent to set aside an order allowing an amendment to the declaration in a cause pending in said circuit, and to strike the amended declaration from the files. The original declaration sought to charge the railroad company as common carrier for the loss of goods shipped over their line and destroyed by fire while in their depot awaiting delivery to a subsequent carrier, and the amendment sought to charge them for negligence as warehousemen. The statute barred the cause of action prior to the amendment in question.

Held, That the case is entirely within *Gorman vs. Judge of Newaygo Circuit*, 27 Mich., 138, and must be ruled by that decision.

Writ granted.

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Fraudulent Transfers:— Husband and Wife:— Creditors:— Preferences:—Existing Debts:—Unliquidated Claims Sounding in Tort:— Evidence:— Valuable Consideration:— Suspicious Circumstances:— Dishonest Motives:— Manufactured Evidence.

MARGARET HILL vs. MICHAEL BOWMAN et al. Appeal in Chancery from St. Joseph Circuit.

May, Buck & Powers, for complainant.
Severens, Boudeman & Turner, for defendants.

COOLEY, Ch. J.:

This is a bill to enjoin the sale of lands, to which complainant has the legal title, upon an execution against her husband in favor of defendant Bowman. The lands had been levied upon under a claim that they had been conveyed by the husband to complainant without consideration and with intent to defraud Bowman. The deed to complainant was given October 26th, 1871. There was then no indebtedness by the husband to Bowman, but the latter made claim against him for negligently setting a fire which spread to Bowman's lands and caused him serious injury. The validity of this claim was not recognized, and on November 7th, 1871, Bowman brought suit for this negligent injury, which resulted in a judgment two years later, for $1,000 and costs. It is by virtue of an execution on this judgment that the land is threatened to be sold.

Held, 1. That the conveyance to complainant could not, under these circumstances, have been intended to delay or defraud a creditor, for Bowman was not a creditor at the time; that his claim sounded in tort and was unliquidated, and it could not become a debt until it should have been prosecuted to judgment; he had a claim for redress, but he held no debt.

Held, 2. That complainant asserts, and the evidence sustains it, that the deed to her was made in satisfaction of loans she had previously made to her husband of moneys she had inherited, and which with interest nearly equalled the value of the land; that the husband had a clear and undoubted right to pay the debt, and, if necessary, to prefer his wife over other creditors in so doing; that under our law permitting a debtor to give preferences among creditors, a wife may be preferred as a creditor with quite as much justice and propriety as any other.

Much stress is laid on certain suspicious circumstances claimed to indicate fraudulent motives and dishonest pretences. The following are enumerated: The husband conveyed all his property; there was no change in the possession, but he still continued to cultivate and enjoy the land; the conveyance was secretly made, and was not recorded until some time afterwards, and then only

on the grantor advising it; it was made after suit threatened, and it was made to his wife. It is also claimed that certain notes from the husband to the wife, which they produce as evidence of the loans, bear on their face evidence that they were not written at different times, as the parties pretend, and it is argued that they were manufactured for the purposes of this suit.

Held, That if there were any real doubt of the husband having had complainant's money, as she asserts he did, these circumstances might tend to show the whole transaction to be one entered upon and carried out under false pretences; but the indebtedness being satisfactorily established, all these circumstances go for nothing; that the fact that the threatened suit was her motive for insisting upon payment could not affect her rights; that if it were satisfactorily shown that the notes alluded to were made on an afterthought, that would not render the conveyance fraudulent, for the debt existed independently of the notes, and the right to payment upon it ought not to be affected by any weak, foolish or even criminal conduct in an attempt to sustain the case by manufactured evidence, which, however, is not satisfactorily shown to be the case here; that complainant was entitled to the relief prayed.

Decree reversed, with costs of both courts, and decree directed according to the prayer of the bill.

Contracts: — Extension: — Pleadings: — Admissions: — Sale of Lands:— Election:— Assumption of Possession:— Notice in Writing:— Marketable Title:— Mortgages:—Payment:— Time allowed for Election: — Litigation between Third Parties:— Assertion of Title:— Measure of Recovery: — Purchase Price.

JAMES CURRAN vs. SAMUEL ROGERS. Error to Van Buren Circuit.

B. F. Heckert and *A. J. Mills*, for plaintiff in error.
Severens, Boudeman & Turner, for defendant in error.

CAMPBELL, J.:

Rogers sued and recovered judgment against Curran & Tripp for the non-fulfillment of a contract whereby they were claimed to have agreed to purchase a parcel of timber land. The contract was in writing, and provided first for the sale of the timber separately for $2,000, and for the refusal of the land for five months at $1,500. The contract was signed by Tripp in the presence and with the assent of Curran, in the name of the firm of Curran & Tripp, who were partners in the lumbering business. Within the five months Rogers was notified by written notice, signed in firm name, that "Curran and I have concluded to buy

that land as stated in contract. We were to decide before the 20th of April, 1873." Curran & Tripp took possession and exercised and asserted ownership beyond what related to the timber first purchased. Curran now seeks to avoid the contract as invalid. The plea was the general issue, without any affidavit denying execution of the contract.

Held, 1. That the objection that Tripp was not authorized to act for both is not open on this record, the execution of the papers, which were set out verbatim and alleged to have been jointly executed, being admitted by the pleadings.

Held, 2. That the original contract was in itself a complete bargain subject only to an act of election, and as no form of signifying the election was prescribed, it might be by assuming possession, as well as by writing, and that irrespective of the written notice, the acts of possession and ownership were unequivocal and sufficient to operate as an irrevocable election.

The vendor tendered in season a proper warranty deed. It was insisted on the trial that the title was not such a clear and marketable title as the law requires.

Held, 1. That so far as mortgages are concerned, evidence of the payment of such as were outstanding was sufficient; that mortgagees in this state having no right of possession, there is no right of entry until after foreclosure beyond redemption, and proof of payment is therefore proof that there is no incumbrance, and the failure to release of record a satisfied mortgage would not be evidence of a bad title.

Held, 2. That it is questionable whether the time allowed for election ought not to be regarded as designed, as it was certainly adapted, to enable defendants to inquire concerning such matters as were reasonably open to inquiry.

Evidence was given of a litigation in the United States court between different parties in which these lands were included in a large number of other parcels.

Held, That as this suit was between other parties and it does not appear that Rogers' title was there attacked, the evidence was properly disregarded, and that if there was anything in the facts assumed in that litigation which could affect the title, those facts should have been proved here; that titles cannot be encumbered by assertions of third persons, and a litigation purely between third persons is no more than any other assertion.

It is insisted Rogers did not tender a conveyance within a reasonable time.

Held, That there having been no attempt on the other side to rescind, time was not made essential, and so long as the vendees retained general control of the land, they were not prejudiced by the delay.

The recovery was for the price of the land.

Held, That this was correct; that plaintiff was entitled to re-

cover precisely what defendants had agreed to pay, so long as he was ready and willing to convey; that they can not require him to take the land back, they having taken and remained in possession and acquired the equitable title.

Judgment affirmed, with costs.

Equity Practice:—Foreclosures:—Sales:—Publication:—Report of Sale:—Affidavit of Publication:—Notice:—Confirmation.

JOSEPH PERRIEN vs. EDWARD J. FETTERS et al. Appeal in Chancery from Superior Court of Detroit.

F. H. Canfield and *Hoyt Post*, for complainant.

Otto Kirchner, for defendants.

GRAVES, J.:

This is an appeal from an order of confirmation of a foreclosure sale. The commissioner's report of sale stated that he had caused public notice of the sale to be publicly advertised for seven weeks successively, once in each week during the seven weeks immediately preceding the sale, in the Detroit *Free Press*, etc., and by posting, etc.; the report, however, embraced the affidavit of publication, which was the proof on which he acted, and the basis thereof. This affidavit was of the publication of the notice in the *Free Press*, a daily newspaper, "once in each week for seven *times*, and that the first publication thereof was on the 19th day of January, 1876." The report was duly excepted to, one of the exceptions being for want of lawful publication of notice of sale. The exceptions were overruled and the sale confirmed, and defendants appealed.

Held, 1. That the affidavit of publication must be considered as proof of the facts stated in it, but that it fails to prove due publication; that due notice of sale is indispensable in foreclosure cases, and is a step in the nature of execution, and strict proof should always be made and put on record.

Held, 2. That the statement of the commissioner in his report of due publication does not avoid the defect in the affidavit upon which the report rests as proof; that the statute (Comp. L., Sec. 5927) contemplates a showing by affidavit, and not by the officer, but by the printer or his foreman or clerk.

This publication was begun several days before the time limited by the decree for payment, but the sale was not made till after the expiration of the time allowed for payment.

The query is suggested whether the practice of beginning publication before default in payment, as provided by the decree, is permissible.

Order of confirmation and sale set aside, with costs, and case remanded for further proceedings.

Mortgages:—Tender:—Subsequent offer of Discharge:— Subsequent Recognition of Mortgagee's Rights:—Waiver: Common Counts.

SIDNEY O. RUSSELL vs. HENRY P. FRY. Error to Ingham Circuit.

Jay Calkins and *T. A. Wilson*, for plaintiff in error.
Shaw & Prindle and *M. V. Montgomery*, for defendant in error.

COOLEY, Ch. J.:

This was assumpsit on the common counts to recover the amount of a mortgage which defendant claimed had been discharged by a tender of the amount due. The tender was refused because it did not include an attorney fee provided for in case of proceedings taken to foreclose.

Held, 1. That it is not clear upon the face of the mortgage that the attorney fee was not payable in consequence of proceedings which had been taken, but that the offer, proved to have been afterwards made by the plaintiff, of a discharge on receipt of the amount due on the debt, being in the nature of an offer of compromise, and defendant having taken the discharge, instead of relying upon his tender, saying he would take his own time to pay in, here was a recognition of plaintiff's right to demand and receive of him the amount.

Held, 2. That the money counts were sufficient to authorize this recovery.

Judgment affirmed, with costs.

Fraudulent Transfers:—Deeds:—Growing Crops:—Conveyance Fraudulent as to Creditors:—Execution Levy:—Evidence.

ELVAH F. PIERCE vs. WILLIAM HILL. Error to St. Joseph Circuit.

Severens, Boudeman & Turner, for plaintiff in error.
W. L. Stoughton and *Charles Upson*, for defendant in error.

MARSTON, J.:

John Sturgis, Jr., on September 16, 1872, conveyed to defendant in error certain lands upon which there was then growing a crop of wheat that had been sowed about two weeks previously. The plaintiff in error, as sheriff, levied an execution against said Sturgis, upon the wheat in question, subsequent to said conveyance, and after it had been harvested the following summer took actual possession thereof. Defendant in error thereupon brought replevin. Upon the trial the defendant, after proving the debt, judgment, and other necessary preliminaries, offered to show by parol evidence that

the deed from Sturgis to Hill was fraudulent as against creditors. To this offer plaintiff's counsel objected, and the court sustained the objection. No question was made as to the regularity of the proceedings; but it was insisted that the conveyance was conclusive evidence of Hill's title to the land and crops until it was set aside, either by a levy and sale of the land and an action of ejectment afterwards brought to test the title thus acquired, or by a bill in chancery in aid of an execution levied upon the land.

Held, That the wheat having been immediately previously in existence and subject to levy and sale upon execution in favor of Sturgis' creditors, a sale of it at this time, with intent to hinder, delay or defraud his creditors, would have been as to them fraudulent and void; and it would make no difference whether the sale was a verbal or a written one, under seal or without seal, or what might have been its form; that the law in dealing with such sales does not, out of respect to the instrument by which the fraudulent conveyance is made, hesitate to declare such a sale void, as to do so would be but pointing out a way for the fraudulent debtor to effectually place his property beyond the reach of his creditors; that the intention of the parties in making the sale, and its effect upon the creditors of the vendor, is what guides and governs the court and determines the question; that the right of the creditor to levy upon the land did not deprive him of the like right to subject the wheat to the payment of his claim, and that the debtor could not, by a fraudulent sale of the land, prevent his creditor from levying upon the crops as though no such sale had been made; that such sale and conveyance is absolutely void as to the creditors of the grantor, who may disregard it as of no force, and not binding upon them or affecting any of their rights.

Judgment reversed, with costs, and a new trial ordered.

Chattel Mortgages:—Authority to Sell in Ordinary Course:—Power of Sale:—Right to take Possession.

JOHN WINGLER et al. vs. SYLVESTER SIBLEY et al. Error to Kent Circuit.

Taggart, Allen & Wolcott, for plaintiffs in error.
Taggart, Simonds & Fletcher, for defendants in error.

CAMPBELL, J.:

Defendants in error, Sibley, Endicott & Co., of Chicago, on August 5, 1874, were creditors of the firm of Odell & Talbot, of Lowell, Michigan, to the amount of $256.30, and plaintiffs in error were creditors also to the amount of $144. Odell & Talbot mortgaged their stock in trade—being retail dealers in groceries and provisions—to Sibley, Endicott & Co., to pay their debt in five

monthly installments, the mortgage containing the following provision: "It is hereby agreed that the said party of the first part shall be allowed to continue the sale of goods from said store as though this instrument was not made." There was not only the usual power of sale, but also authority in the mortgagees to take possession at any time when they should think themselves insecure. The mortgage was duly recorded. On the next day Odell & Talbot, on being applied to by plaintiffs in error for payment of their debt, offered to turn out goods enough at market rates to pay them. On taking an inventory, they figured the goods up at a price which exceeded that indebtedness by only four dollars, and it was arranged that plaintiffs in error should take the whole stock and refund the surplus. They had no actual notice of the chattel mortgage. On being sued by the mortgagees, they defended on the ground that the mortgage was invalid. There is no finding or pretense that the mortgage was fraudulent in fact, nor that it was not valid betwen the parties, nor that the record was not in due form.

Held, That this mortgage, fairly interpreted, means no more than those uniformly held valid, which allow sales in the ordinary course of business, which here was retail business; that a continuance of sales as though the mortgage had not been made, means no more than this, and it would be absurd to suppose it was intended no rights should accrue to the mortgagees who were expressly allowed to take possession at their pleasure; and that the court below acted rightly in upholding the validity of the mortgage.

Judgment affirmed, with costs.

Specific Performance:—Forfeiture:—Land Contract:—Cutting Timber:—License:—Tender of Purchase Price:—Costs:—Allowance for Expenses.

WILSON STICKNEY et al. vs. SAMUEL K. PARMENTER et al. Appeal in Chancery from Mecosta Circuit.

Blair, Stone & Kingsley, for complainants.
H. H. Harmon for defendants.

COOLEY, Ch. J.:

This is a bill by the vendees for specific performance of a land contract. The defense is that the vendees have forfeited the contract by taking off timber in violation of its conditions. The fact is admitted, but it is sought to be justified by a parol agreement with the vendor that the vendees might cut the timber in consideration of hastening the time for the payment of the purchase price. This agreement, if made at all, was made prior to an assignment of the contract by the vendor to the present owner, and was unknown to the latter and unperformed at the time of

the assignment. When he found the timber was being taken off he declared the contract forfeited for that cause, and brought suit in ejectment for the lands. The vendees then tendered the purchase moneys, with taxable costs in the ejectment suit.

Held, 1. That the agreement that the timber might be cut is not satisfactorily made out; that as the value of the land consisted mostly in the timber, and the contract was evidently a very valuable one to the vendees, the showing on this point ought to have been very clear; that while the understanding, if there was one, remained unperformed, it was a mere license, and would be revoked by the vendor's sale of his contract to one ignorant of it.

Held, 2. That when the vendees came, without much delay, and tendered payment of the purchase price, it should have been received, but that the tender ought under the circumstances to have included something as costs beyond such as were taxable, as defendants were seeking relief against a forfeiture, and should have been sufficient to make the other party whole; and that an allowance of $200 beyond the taxable costs would have been reasonable to cover additional expenses incurred.

The original vendor was made a party, and he filed a disclaimer. Costs, however, were awarded against him.

Held, That this was erroneous; that having parted with his interest subject to the vendee's rights, no fault is attributable to him, and there was no occasion for further retaining him as a party after he had disclaimed.

Decree reversed as to the original vendor, with costs of both courts, and modified as to the other defendants by making to complainant the allowance of $200, and by denying costs, no costs being awarded to either party in either court.

The following causes were decided at the hearing, no written opinion being delivered:

The People ex rel. Peter Cantine *vs.* The Judge of St. Clair Circuit. Mandamus. Writ granted.

The People ex rel. Peter Yates *vs.* The Judge of Ottawa Circuit. Mandamus. Writ denied.

The People ex rel. Friend Palmer *vs.* The State Military Board. Mandamus. Writ denied.

The People ex rel. Ephraim C. Logan *vs.* The Judge of Berrien Circuit. Mandamus. Writ denied.

The Farmers' Loan and Trust Company *vs.* Eugene G. St. Clair. Error to Marquette Circuit. Reversed.

Betty C. Canfield *vs.* Augustus H. Canfield. Appeal in Chancery from Wayne Circuit. Reversed, and decree of divorce granted.

Robert E. Roberts *vs.* James Caplis et al. Appeal in Chancery from Superior Court of Detroit. Reversed.

Isaac G. Bliss *vs.* Adam Burgent et al. Error to St. Joseph Circuit. Reversed.

Prentiss S. Hewitt et al *vs.* Zelotas J. Carpenter. Error to Calhoun Circuit. Writ dismissed.

Allan Shelden et al. *vs.* The Chicago & L. H. R. R. Co. Error to St. Clair Circuit. Affirmed.

John Wagner *vs.* Marshall D. Frink. Error to St. Circuit. Reversed.

Benjamin L. Baxter *vs.* Jay Sautres. Certiorari. Reversed.

Horace E. Bunce *vs.* Samuel Bailey et al. Appeal in Chancery from St. Clair Circuit. Reversed and bill dismissed.

Edwin R. Seeley *vs.* The Board of Education of Port Huron. Error to St. Clair Circuit. Affirmed.

Benjamin Beach et al. *vs.* George Golds. Error to Kent Circuit. Reversed.

The following cases were carried over undecided.

Martin Ryerson *vs.* Harrison J. Brown. Certiorari to Judge of Probate.

James E. Scripps *vs.* Cornelius J. Reilley. Error to Superior Court of Detroit.

David Whitman *vs.* Lewis Curtis et al. Error to St. Clair Circuit.

Marvin Dorrell *vs.* Charles J. Eaton et al. Error to Jackson Circuit.

George N. Potter *vs.* Thomas H. Brown. Error to Eaton Circuit.

Alonzo Bennett et al. *vs.* Horace Dean. Error to Jackson Circuit.

William R. Bowes *vs.* Alvin J. Haywood. Error to Ottawa Circuit.

Liverpool, London & Globe Ins. Co. *vs.* John A. S. Verdeen et al. Error to KentCircuit.

State Ins. Co. *vs.* James S. Reynolds. Error to Ingham Circuit.

James Johnson *vs.* Erastus A. Knapp. Appeal in Chancery from Kent Circuit.

James G. Wright *vs.* Samuel V. Irwin. Error to Calhoun Circuit.

Joseph S. Tuttle *vs.* The Mich. A. L. R. R. Co. Error to Jackson Circuit.

The Hubbardston Lumber Company *vs.* Benjamin R. Covert. Error to Ionia Circuit.

The Grand Rapids, Ind. & L. S. R. R. Co. *vs.* The Grand Rapids & Ind. R. R. Co. Appeal in chancery from Kent Circuit.

The Grand Rapids Bridge Company *vs.* Charles Prange. Case made from Kent Circuit.

The Kimball & Austin Manufacturing Company *vs.* Seth Vrooman. Error to Kalamazoo Circuit.

Lucy Proctor *vs.* Hiram B. Robinson. Appeal in Chancery from Van Buren Circuit.

George B. Ashley *vs.* The City of Port Huron. Error to St. Clair Circuit.

Moses V. Aldrich *vs.* A. Lamont Chubb. Case made from Kent Circuit.

The court adjourned *sine die.*

REPORTS OF SELECTED CASES

DECIDED IN THE

CIRCUIT COURTS OF MICHIGAN.

SIXTEENTH CIRCUIT.

Circuit Court for St. Clair County.

David J. Stewart v. Francis J. Barber.

A short summons issued June 28, served June 29, and returnable July 1, is served in time.

In computing the time the day of service is excluded and the day of return is included.

The plaintiff in error, who was also plaintiff below, commenced suit by summons against defendant in justice's court. The summons was dated and issued June 28, returnable July 1, and was personally served June 29.

Of the proceedings had on the return day, the justice makes the following return in answer to a writ of certiorari:

"That on the 1st day of July 1876 at 10 o'clock A. M. case called parties appeared before me defendant atty asked to discontinue the cause on the ground the summons was not served two full days from the time of service to the time of appearance plaintiff objected to motion for discontinuance sustained and cause discontinued with costs "75 cts"

Dated and signed by the justice.

The plaintiff, evidently understanding that a judgment of non-

suit and for costs had been rendered against him, brings the case to this court by certiorari, and the case is argued by counsel on both sides and submitted upon that theory or understanding.

E. R. Stevenson and F. Whipple, *for Plaintiff in Error.*

C. R. Brown and T. J. McSweeney, *for Defendant in Error.*

HARRIS, J.: The question is whether or not, under Comp. L., § 5264, two full days must elapse between the day of service and the day of return of a short summons.

The rule adopted by our Supreme Court seems to be to exclude the day of service and include the day of return.—23 Mich., 1, 293.

Under this rule the service in this case was good, and the judgment of the justice, *if it is a judgment*, must be reversed, with costs.

The People ex rel. Albert Dota v. Malcolm McKay.

Circuit Courts have power in certain cases to issue the writ of mandamus to justice's courts.

After a cause in justice's court is adjourned, the justice can enter no judgment prior to the adjourned day, except, perhaps, by consent or after notice.

Where the justice, prior to the adjourned day, has assumed to enter judgment of discontinuance on the application of plaintiff, and refuses to do anything on the adjourned day, mandamus is the proper remedy to compel him to act.

But the Circuit Court will not direct what action shall be taken or judgment rendered.

On the 6th of July last the respondent, a justice of the peace of the city of Port Huron, issued a summons in favor of Daniel J. Stewart, a non-resident of this county, against this relator, Albert Dota. This summons was returnable July 10, and was duly and personally served. On the return day the parties appeared by attorneys and the cause was adjourned, and afterwards several adjournments were had, and finally it was adjourned from July 25 to August 15.

On the 31st day of July the plaintiff by his attorney appeared before the justice, and as the justice returns, "withdrew and discontinued said cause," and thereupon the justice, claiming to act under Comp. L., § 5380, rendered a judgment against plaintiff for costs, taxed at $2.35, being all the costs, so far as the justice was then

informed. At the time of this entry neither the defendant nor his attorney was present.

On the adjourned day, August 15, the defendant appeared ready for trial, and after waiting an hour, the plaintiff not appearing, the defendant asked for judgment, and that his costs be taxed. The justice refused to take any further proceedings or cognizance of said cause, for the reason, as he then said, that said cause was not then pending before him.

Thereupon the defendant, the relator herein, applied to this court for a mandamus requiring said justice to render such a judgment as should have been rendered on said adjourned day, and on the facts as they then appeared.

An order was made requiring the justice to show cause why a mandamus should not issue, and the cause shown was the facts as before set forth, with some matters not material to the determination of the questions raised. The relator demurred, and the respondent joined in demurrer.

C. R. Brown and T. J. McSweeney, *for Relator.*

E. R. Stevenson and F. Whipple, *for Respondent.*

HARRIS, J.: The first point raised is, that *this* court has no authority to issue the writ asked for, and *McBride v. The Common Council of Grand Rapids*, 32 Mich., 360, is relied on to support this position. But this is an authority quite the other way. The court say, on page 364, "It" (the writ of mandamus) "is a very proper writ to enable the Circuit Courts to give effect to their appellate and supervisory authority in some cases, and is often made use of for such purposes." And in arguing the case and reviewing the authorities, the court say, on page 367, "These considerations lead me to the conclusion that the constitution does not give to the Circuit Courts jurisdiction of the enumerated writs, except for the purposes of the jurisdiction which in general terms is conferred."

And the Constitution, art. 6, § 8, gives to the courts supervisory control over inferior jurisdictions—not over common councils or State or county officers, for they are in no legal sense inferior courts or tribunals.

I have no question, then, but that upon a proper showing and in a proper case this court may issue a writ of mandamus to a justice of the peace, and the only question is, do the circumstances of this case call for the interposition of this court by this writ.

The cause having been adjourned from July 25 to August 15, the justice in the meantime could do nothing in the case. His action on the 31st of July was illegal and utterly void. Section 5380 furnished no justification for the action taken. A clear legal duty rested upon the justice to take some action or render some judgment on the adjourned day. This legal duty the justice, on request, refused to perform, and mandamus is the proper remedy to compel him to discharge his duty.—26 Mich., 22. Otherwise this is a denial of justice.

The case stood regularly for hearing on August 15, and on that day, if the plaintiff failed to appear, it would seem as though the only thing the justice could do was to render a judgment of non-suit and for costs.—29 Mich., 199.

But it is not for this court to say what judgment he shall enter, or what action he shall take.

Let a writ of mandamus issue requiring the justice to render such a judgment, as of the date of August 15, or take such other action, as the facts then before him required.

Everything tends to show that the justice acted in entire good faith, and no award of costs can be made against him.

In the Matter of John F. Kelly.

The complaining witness in a criminal case is not liable to an action for false imprisonment at the suit of the accused during the pendency of the prosecution.

On or about June 15, 1876, the petitioner, John F. Kelly, made a complaint in due form to a justice of the peace against one Alexander, charging him with perjury. A warrant was issued; defendant was arrested, examined and held for trial. At the August term of court, upon being arraigned, he moved to quash, without assigning any reasons. The motion was denied. He

then declined to plead, and by order of the court a plea of not guilty was entered. Thereupon, by consent, the cause was continued over the term, and the bail already given was respited.

On the 26th of August, Alexander commenced a civil suit against Kelly by capias to recover damages for "malicious prosecution and false imprisonment," as is alleged in the writ.

The affidavit attached to the writ sets up that Kelly, without any just reason and for no probable cause, made an unjust and unfounded complaint, and therein falsely and maliciously accused him (Alexander) of being guilty of willful and corrupt perjury; that on such complaint he (Kelly) procured him (Alexander) to be arrested; that he was wrongfully arrested and falsely imprisoned on and for such false and malicious charge; that he was compelled to appear before the justice, and was examined and held to answer in the Circuit; that thereby he has suffered in his good name, been put to expense and trouble, and claims damages $20,000.

Upon this affidavit the commissioner endorsed upon the writ an order that defendant Kelly be held to bail in the sum of $5,000.

Kelly was arrested, and made his application in due form for a writ of habeas corpus. The writ was issued and served, and the sheriff returns that he holds Kelly by virtue of the capias, affidavit and order above mentioned.

The matter came on to be heard.

C. R. Brown, *for Petitioner.*

Atkinson & Stevenson, *contra.*

HARRIS, J.: It is claimed on the part of the petitioner that the affidavit annexed to the writ is not sufficient in this, that it does not state that the proceedings against Alexander are at an end, and further, that the petition of this applicant and his proofs show that the proceedings are *not* at an end, and therefore it is claimed that the action cannot be maintained, or at least that there is no justification for the arrest of Kelly, and 27 Mich., 539, among other causes, is relied on to support the claim made. On the other side it is conceded that the position taken by counsel for petitioner is correct so far as it relates to malicious prosecution,

but it is claimed that it does not apply to the action for false imprisonment, and 22 Mich., 300, is relied on. A distinction seems to be made in this case (in 22 Mich.) between arrests in civil and in criminal causes. That was a *civil* cause. In *Holcomb v. Bonnel*, 32 Mich., on page 8, the Supreme Court say, "It is supposed that decisions will be read, not as abstractions, but as propositions inseparably bound up with the particular issue and matters the court is then dealing with." Applying this rule to the case in 22 Mich., it does not support the position taken, even if a fair reading of it does in terms support it, which is doubted.

And when it shall be determined that the complaining witness in a criminal case is liable to be proceeded against for false imprisonment as soon as the accused is arrested and held for trial, the criminal code had better be repealed at once, for very few men would be willing to make complaint if by so doing they could at once be made defendants in a civil suit.

The conclusion on this application, then, is that the affidavit does not justify the holding of the petitioner, especially when it appears, as in this case, that Alexander is now out on bail awaiting trial in the criminal case.

Petitioner discharged. See also *Murphy v. Walters*, Supreme Court, June term, 1876.

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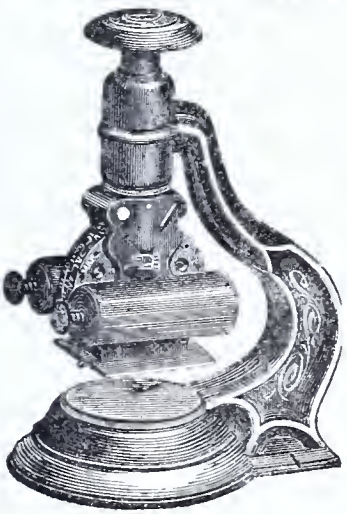

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